Sovereign Language:
The Rhetoric of the Terror War Presidents

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Dedication

To Emma for her endless patience and encouragement. To Kirk and Theresa for their enduring support.

Abstract

In the years following the September 11 attacks Presidents George W. Bush and Barack Obama expanded the power of the presidency to pursue the terror wars. This project explains how this was accomplished by performing a rhetorical criticism of the signing statements, executive orders, and presidential policy directives issued by both of the terror war Presidents. Drawing on insights from scholarship on the rhetorical presidency this project argues that the expansion of presidential powers is best understood as an attempt to incorporate the practices of public address into the exercise of personal power by the President. The implications of this tactic are manifest in the policies produced to pursue the terror wars, including enhanced interrogation, indefinite detention, continuous undeclared wars, mass surveillance, as well as other abuses of human dignity. The powers afforded to the terror war Presidents to pursue these policies have had a detrimental impact not only on the Constitution, but on the democratic practices of the United States. This project argues that the only hope for substantive change will be a fundamental change between the presidency and the public. The presentation will focus on the use of signing statements by both President George W. Bush and Obama to defend and end the practice of indefinite detention. Against legislative efforts to oppose both Presidents by Congress, both Presidents asserted the primacy of the presidency in determining how detained persons ought to be treated and how the terror wars would be fought. Although there are important policy differences between these two Presidents, they shared a commitment to defending the power of the presidency that caused both to circumvent the dictates of Congress. This example represents a microcosm of the broader trends in the presidency during the terror wars toward affording the presidency a sovereign position to unilaterally dictate policy for the country.

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Introduction

Since the ratification of the Constitution, the office of the President has been an evolving and ever more controversial office. As different presidents have assumed the office their personalities and policies have given a distinctive texture to the office that was defined by their predecessors and informed their successors producing changes that have created distinct epochs in the history of the presidency. It seems clear now that beginning on September 11, 2001 a new epoch began during which Presidents George W. Bush and Barack Obama redefined the office.

This epoch was not, as might be imagined, defined by the attacks that took place on that day, but by the actions of Presidents George W. Bush and Barack Obama to address the perceived threat of terrorism. These actions fundamentally changed the nature of the presidency, merging previously distinct yet related elements of the office to empower the president to make decisions with a far greater degree of freedom and of much greater consequence. What defines this era is the synergistic relationship between speech and action that has dissolved them during the rhetorical presidency with the result that they are now one and the same.

The dissolution of this distinction has had dramatic consequences for contemporary politics. Although there can be no doubt can be had about the desire of prior Presidents to gain ever more power, there can also be little doubt that the specific means used and ends desired by the George W. Bush administration and the Obama administration are departures from their predecessors. Their distinctiveness arises from a synergy of opportunity, capacity, and desire that mark this moment in presidential history. The best evidence is not in what these Presidents said: as Eric Alterman aptly

pointed out, Presidents lie.[1] Nor is it evidenced only in the policies that changed the wars as they were fought; those were merely the inevitable outcomes of presidential action. Instead, the best evidence of these changes can be found in the documents that inaugurated these changes. The language embedded in these speech acts use distinctive rhetoric that provides crucial insights not just into what policies these Presidents wished to create, but also how they viewed the office they occupied.

Deploying rhetorical analysis to understand the function of language these documents, I conclude that both of the "terror war" Presidents advocated different policies, but relied on a largely similar view of the presidency.[2] In my analysis some important differences will be acknowledged, but those differences tend to be of degree rather than kind. Ultimately both Presidents relied on a vision of the presidency as broadly empowered, and relied on the use of what are commonly termed presidential powers to expand and defend the power of the office. To demonstrate this I will perform offer a rhetorical analysis of the texts of the signing statements, executive orders, and presidential policy directives issued by both Presidents to create the policy frameworks and institutions that were used to pursue the terror wars.

A rhetorical analysis of the language in and around these presidential powers provides an understanding of how the terror war Presidents have viewed the proper

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[1] Alterman, Eric. *When Presidents Lie: A History of Official Deception and Its Consequences* (New York: Penguin Group, 2004), 2-3.

[2] I borrow the term terror war here from Hayes because the "War on Terror" frame deployed by the George W. Bush administration might have broken down, but conflict remained and indeed became more dispersed such that the countries primarily identified with the War on Terror are not the limit for the conflict. Where the title "War on Terror" is used in this text it is a reference to the language used by the Bush administration. For more on the subject of terror wars see: Hayes, Heather A. *Violent Subjects and Rhetorical Cartography in the Age of the Terror Wars*. (London: Palgrave MacMillian, 2016).

institutional role of the presidency. The documents offer clues to how Presidents conceived of those powers as distinct tools (expressed as distinct genres of speech) that served important ideological as well as policy functions. The decisions made by the terror war Presidents in word choice, tone, framing, and ideographs provide clues not just of how the Presidents viewed the nature of the policy dilemma facing them, but also the ideological commitments that prompted them to expand the power of the presidency.

In adopting this approach I am departing in certain ways from the traditional understanding of rhetoric as persuasion. Although I argue that presidential powers are intended to be persuasive, I contend that there are types of rhetoric that are not primarily persuasive, at least in the traditional sense. Instead, I propose an understanding of rhetoric as a process of creating shared meanings. This broader understanding is willing to depart in from persuasion as the sign of rhetoric, because presidential powers are used in ways that do not persuade so much as inaugurate a change in a state of affairs. What a rhetorical analysis provides within this broader understanding is a hermeneutic approach to account for speech that has the ability to inaugurate change as well as speech that seeks to persuade an audience in dialogic communication.

In this project I argue that the terror war Presidents have sought to expand the power of the office of the President by dissolving the distinction between language and action. To do this, both Presidents used presidential powers to assert a sovereign role for the presidency that undermined the importance of the other branches and limited the possibilities for democratic action. This intervention was a response to, and enabled by, the attacks on September 11, 2001, but these shifts were not inevitable. Instead, they

were a deliberate response designed to empower the office of the President in ways that were perhaps not unprecedented, but have proved to be uniquely problematic for a democracy.

Studying the Presidency

In studying the expanding powers of the presidency two significant critiques emerge. One school of thought developed by scholars such as Jeffrey Tulis have taken up the "bully pulpit" described by Theodore Roosevelt as a particular problem for constitutional thought stemming from a public persuasive power not conceived of when the Constitution was drafted (97).[3] As Tulis argues, Presidents following Theodore Roosevelt, such as Wilson, created a rhetorical presidency that draws its power from the privileged speaking position afforded to the President to create change through shaping public sentiment. Another school of thought described by critics such as William Howell has argued that the presidency now has the ability to exercise power through direct action that makes persuasion if not irrelevant, then of greatly reduced significance (175-177).[4] In this view, foreshadowed by Arthur Schlesinger's description of an imperial presidency, the emphasis is on the question of the constitutionality of unilateral action that is reasonably argued to go beyond the powers in the office of the President as defined by the Constitution.[5]

Attempting to unify these differing conceptions of the presidency is inherently difficult, in that they apparently are opposed paradigmatic views of the presidency that

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[3] Tulis, Jeffrey. *The Rhetorical Presidency* (Princeton: Princeton University Press, 1987), 3.
[4] Howell, William G. *Power without Perusasion: The Politics of Direct Presidential Action* (Princeton: Princeton University Press, 2003), 175-177.
[5] Schlesinger, Arthur. *The Imperial Presidency*. (Boston: Houghton Mifflin Press, 1973).

spawn disparate critiques. The view taken by adherents of the Schlesingerian point of view has its contemporary proponent in Andrew Rudalevige who refers to the "new imperial presidency."[6] This approach holds that the George W. Bush Administration took up the mantle of past Presidents to resurrect presidential supremacy in reference to the actions taken by Congress to limit the presidency following Watergate and the U.S. withdrawal from Vietnam. This view tends to emphasize direct action, especially the prodigious use of presidential powers such as executive orders. This approach questions separated powers, constitutional authority, and ultimately the proper place of executive action in democratic politics. Within these recurring topoi, scholars and politicians of differing political commitments argue the merits of a stronger or weaker executive branch.

In the second view of the bully pulpit Tulis argues that the changes to the presidency during the 20th century metamorphised the presidency through the use of public persuasion. In Tulis' view, expressed during the Reagan administration, scholars have not paid sufficient attention to the way in which reliance on public persuasion had changed the office. In particular, Tulis is critical of scholars following Richard Neustadt in focusing on the personal characteristics of Presidents as a means to explain how the office is performed through bargaining practices rather than the development of the presidency as an institution (10-13).[7] What concerns Tulis is the tendency in bargaining analysis to ignore fundamental changes in presidential practice, including the turn from

[6] Rudalevige, Andrew. *The New Imperial Presidency* (University of Michigan Press: Ann Arbor, 2006).
[7] Tulis, *The Rhetorical Presidency*, 10-13.

separation of powers in favor of more direct presidential action through the use of rhetorical leadership (124-128).[8]

Following Tulis, scholars have attempted to create meta-frameworks intended to account for how Presidents attempt to navigate the decisions about differing strategies of persuasion and direct action. George Edwards offers a particular example of this approach in describing the "strategic presidency." The strategic presidency emphasizes the personal power of the president expressed through the concept of leadership. This perspective holds that Presidents are able to exercise unilateral authority, but this does not in itself constitute leadership (4).[9] Rather, leadership stems from the ability of Presidents to respond appropriately to the contexts surrounding their actions and are therefore able to lead the country toward their desired outcomes. For Edwards, the presidency remains ensconced in a political context that limits the power of persuasion so that personality and persuasion does not explain policy change, but rather take advantage of contingent opportunities to advance a policy agenda (188-189).[10] At work in Edwards approach is a limited view of the presidency. In his view, Presidents do not transcend their position; instead they are left to navigate the opportunities provided for them.

Edwards' analysis is instructive in that it foregrounds the limitations confronting Presidents, yet his far reaching conclusions are suspect. His claim that Presidents are unable to transcend their position purely through the use of rhetoric is tenable where rhetoric is understood only as the act of persuasion. This view becomes more problematic when one considers the kind of paradigm shift recognized by Tulis and

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[8] Tulis, *The Rhetorical Presidency*, 8.
[9] Edwards, George C. *The Strategic President* (Princeton: Princeton University Press, 2009), 4.
[10] Edwards, *The Strategic President*, 188-189.

ignored by Edwards. When Presidents begin to perform the office differently, the expectations, forms of leadership, and strategic options available to the President change. This project points toward such a change in dissolving the distinction between language and action through the use of presidential powers.

Between the "imperial presidency" emphasizing direct action through presidential powers, and the "rhetorical presidency" emphasizing public persuasion, there is a disciplinary divide that is significant. For scholars of political science there is a tendency to focus on presidential action that emphasizes the Constitution and political theory as a measuring stick to evaluate the legitimacy and desirability of presidential direct action. For scholars of history and rhetoric there is a tendency toward focusing on how Presidents perform the office through public address to influence both public opinion and Congress to initiate policy change. My approach in this project seeks to provide a tentative contextual reconciliation of these viewpoints. By illustrating how the rhetorical character of presidential powers shifted during the terror wars; I explain how the presidency became sovereign through the prodigious use of language.

In the context of the terror wars, Presidents have folded rhetoric into action or, perhaps, have folded action into rhetoric. This project makes the argument that they are now (and perhaps always were) inseparable, but the particular exigencies provided by the September 11 attacks offered Presidents George W. Bush and Barack Obama the opportunity to take greater advantage of the tie between language and action. The resulting changes in the presidency have far reaching consequences for the future of constitutionalism and democratic practice.

Rhetoric in the Post-Rhetorical Presidency

To describe this shift in the presidency, I frequently return to the concept coined by Tulis of a "rhetorical presidency." For Tulis this concept is rooted in a notion of persuasion that, as I have noted above, relies on a limited sense of rhetoric. This limited sense of rhetoric has prompted substantial criticism of the model as no longer descriptive of the presidency. My project seeks to resuscitate the notion of the "rhetorical presidency" by reconciling the concept with its most strident criticisms, while retaining a core premise in the concept, that the language used by Presidents to perform the office has significant consequences.

In recent scholarship the rhetorical presidency model has faced significant criticism. In the most strident critique, Howell has made the argument that there is no particular requirement for persuasion on the part of the President to exercise the power to take unilateral action, merely consent by the Congress and Supreme Court (175-176).[11] This sense, magnified under the George W. Bush administration, has even prompted prominent rhetorical scholars to disavow the concept of the rhetorical presidency. Mercieca and Hartnet have concluded that, in light of President George W. Bush's reliance on disinformation and misdirection, presidential rhetoric defined by traditional norms of persuasion "is dead," and the presidency has become "post-rhetorical."[12] Expanding on this claim Mercieca and Vaughn have argued that the advent of social media and the incorporation of public relations strategies into public discourse has led to

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[11] Howell, William G. *Power without Persuasion: The Politics of Direct Presidential Action* (Princeton: Princeton University Press, 2003), 175-176.

[12] Hartnett, S. J. & Mercieca, J.R. "'A Discovered Dissembler Can Achieve Nothing Great'; Or, Four These on the Death of Presidential Rhetoric in an Age of Empire," *Presidential Studies Quarterly* 37, no. 4, (2007): 599-621.

a new "post-rhetorical presidency."[13] Other rhetoricians such as Stuckey have argued that the rigid adherence to the rhetorical presidency model has produced scholarship that codifies rather than advances presidential scholarship.[14]

At stake in the scholarship on the post-rhetorical presidency is the argument that a paradigm shift has occurred in presidential practice. Contemporary conditions no longer support the traditional tools used to perform the office, in particular public address. Most of this scholarship assumes, as this project does, the exigency of September 11 as a turning point. Where this research departs from my own is the emphasis placed on the decline of rhetoric. In place of such a conclusion I argue that the forums for and purposes of rhetoric for both presidents and scholars have shifted. Rather than emphasizing traditional forms of public address, rhetoric has been directed toward shaping administrations and institutions to develop the power of the presidency through modes outside of traditional public address.

Consistent across the post-rhetorical body of scholarship is a sense that Presidents have increased their reliance on mechanisms apart from traditional public address supplemented by advances in mass media to engage in public persuasion. Yet these changes were already accounted for in studies of the rhetorical presidency through mediated communication. As Jamieson noted of the Reagan administration, the rise of broadcast media required the development of new modes of speech that created distinct

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[13] Mercieca, J. R., & Vaughn, J.S. "The Post-Rhetorical Legacy of George W. Bush" In *Perspectives on the Legacy of George W. Bush.* Ed. Orlov Grossman & R. E. Matthews Jr. (Newcastle upon Tyne: Cambridge Scholars Publishing, 2009), 31-52.

[14] Stuckey, Mary "Rethinking the Rhetorical Presidency and Presidential Rhetoric." *Review of Communication* 10, no. 1 (2010): 38-52.

approaches to public address that she described as "electronic eloquence."[15] Similarly, Hart has argued that one of the inherent parts of the presidency from the outset of the Roosevelt administration has been an ongoing task to understand how mediated communication implicates the practices of governance (146-154). Taken in this light, that social media have risen to prominence does not mean that the rhetorical presidency is dead, but, instead, that Presidents have had to seek new means to perform the office to account for the ways different media forms function. That said, the critique provided by scholars adopting the post-rhetorical presidency framework is a compelling response to understanding the rhetorical presidency that spawned out of Tulis work, which emphasized what Kernell describes as a strategy of "going public."[16] Post-rhetorical presidential scholarship is right to argue that the sites (both literal and figurative) of public persuasion may be changing so that the existing paradigm of the rhetorical presidency should be questioned, but this is not to say that this means there is no longer anything rhetorical in the presidency.

Reframing the question in terms of what is rhetorical about the presidency prompts a broader question of what is rhetoric. A pernicious assumption about the nature of rhetoric is that its definition and limits are inherently tied to the notion of persuasion thanks largely to Aristotle's famous definition that rhetoric is "the faculty of observing in any given case the available means of persuasion."[17] The problem is that using the term persuasion to define rhetoric ignores the importance of the way language is used to

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[15] Jamieson, Kathleen Hall. *Eloquence in an Electronic Age: The Transformation of Political Speechmaking* (Oxford: Oxford University Press, 1990).
[16] Kernell, Samuel. *Going Public: New Strategies of Presidential Leadership* (4th ed). (Washington D.C.: CQ Press, 2006).
[17] Aristotle. *Rhetoric* (Knutsford: A & D Publishing, 2009).

perform the other important functions of language, such as declaring a new state of affairs or commanding others to act. In a later section I discuss the role of speech act theory in describing in particular how rhetoric does not only refer to using language to persuade others to act, but are a means for the speaker to take action as well. For my purposes here what I wish to emphasize is that rhetorical action takes places within a certain social context that gives speech a force that exists apart from pure persuasion. Specifically, my approach is informed by McGee's claim that rhetoric is the sublimation of material forces in symbolic language (40).[18] For McGee, speech takes place within a set of material conditions that define the relationship between speaker and audience; in this case rhetoric creates that relationship in a symbolic form (language) that reproduces the material conditions. Toward that end, the sense that public persuasion is always an operation of a subtle hand that guides a listener to agreement is too limiting. There are moments when rhetoric is used to symbolically to enact a set of power relationships that go beyond simple persuasion into the inauguration of social change.

Broadening the conception of rhetoric beyond persuasion is already foreshadowed in the study of presidential rhetoric, albeit with a residual emphasis on public persuasion. As Campbell and Jamieson argue:

> The Constitution explicitly provides the executive with an array of rhetorical opportunities. The president can call Congress into special session, make recommendations that are necessary and expedient, act as commander in chief, veto legislation and pardon. Some presidents grasp these grants of authority and deploy them in ways that increase presidential power. Others shy away from the exercise of discretionary powers and use those that are mandated only tentatively. Increasingly in

[18] McGee, Michael Calvin. "A Materialist's Conception of Rhetoric," In *Explorations in rhetoric: Essays in honor of Douglas Ehninger*. Ed. R. E. McKerrow. (Glennview: Scott-Foresman, 1982), 23-48.

> modern times, however, presidents have exploited and enlarged their powers, in part through the use of rhetoric (25).[19]

In Campbell and Jamieson's formulations there are "rhetorical opportunities" that exist outside of the public speech (although they certainly can create the exigency for such speech). These rhetorical opportunities do not always take the form of speech, but are operations in and through language that shape the conditions under which Presidents and other public figures act. Thus, a rhetoric exists that does not rely on persuasion. Instead, it works through accepted social conventions (defined in Campbell and Jamieson's work by the Constitution) to perform social action that does not require persuasion.

Campbell and Jamieson have provided an example of how such a configuration works in their discussion of signing statements. Although Campbell and Jamieson acknowledge the rhetorical elements of signing statements, especially to the extent that they provide the President with a bargaining tool, yet they do not go so far as to say signing statements are persuasive (213-214).[20] Indeed, to the extent that Campbell and Jamieson (accurately) characterize the language of the statements as technical and obfuscating, it seems that the signing statement runs counter to common sense understandings of persuasion, but nonetheless convey the will of the President. Similarly, Vanessa Beasley has argued for analyzing the rhetorical presidency alongside the development of constitutional interpretations favoring expansive presidential action, namely Unitary Executive Theory.[21] Embedded in the concept of a rhetorical presidency

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[19] Campbell, Karlyn K. & Jamieson, Kathleen H., *Presidents Creating the Presidency: Deeds Done In Words*. (Chicago: University of Chicago Press, 2008), 25.
[20] Campbell and Jamieson, *Presidents Creating the Presidency: Deeds Done In Words*, 213-214.
[21] Beasley, Vanessa. "The Rhetorical Presidency Meets the Unitary Executive: Implications for Presidential Rhetoric on Public Policy," *Rhetoric and Public Affairs* 13, no. 1, (2010): 7-35.

is the possibility of an interpretation of persuasion that is not limited to what presidents say, but includes what presidents do.

The benefit of the term "rhetoric" is that it acknowledges and foregrounds the privileged relationship between language and action. Broadening the scope of what constitutes rhetoric allows for the acknowledgment that there exist alternative uses of language that can prompt action, such as a command. Even if the premise that the command is rhetoric because it relies on the existing authority for the command to succeed (ignoring the tenuous authority described in the previous section) the particular articulation of a command has consequences for how it is implemented. In this way, traditional conceptions of rhetoric tied to the importance of crafting a message become significant. Explaining the relationship between the specific articulation of a command and action is not distinct in method, theory, or practice from explaining the relationship between persuasion and action inferred in traditional understandings of rhetoric. For this reason, rhetoric in this text does not necessarily refer to the practice of persuasion, but rather to the use of language to prompt other bodies to action. Adopting this point of view, rhetoric functions as a polysemic term that binds together the presumptively distinct categories of language and action.

In taking this approach to language the scope of the rhetorical presidency goes beyond public persuasion to intervene in the institutional and organizational practices of the executive branch. This approach does not conceptually disavow the public persuasive elements of the rhetorical presidency. Instead, it argues that the rhetorical presidency is multifaceted. Public rhetoric is one face that has appropriately garnered much recent

attention, but study of it does not provide a complete model of the presidency. By expanding the field of rhetoric beyond persuasion, a view of the presidency is developed that can account for the language used by Presidents to initiate action that does not rely on explicit efforts at persuasion.

The most prominent place for this is in the institutional and organizational work done by presidents to shape the agencies housed under the executive branch, what Richard Nathan has called "the administrative presidency."[22] In the context of the George W. Bush administration and his successor, an accounting for such an effort is timely. As David Lewis argues, "Bush's personnel operation is arguably the most sophisticated of the modern presidents for enhancing control. This administration learned the lessons of past presidents and used the levers of personnel power effectively (37)."[23] In light of the significant efforts by the Bush and Obama administrations to use direction and control over the executive agencies to enact changes in policy an account is needed that explains how the language embedded in the reorganization of the executive branch incorporates the political commitments of the president into the functioning of the office.

The rhetorical presidency lives, but it does so in a different form. In the current form, language is a means of action. Post-rhetorical presidency scholars are correct in recognizing that the traditional modes of public address do not serve the same function for Presidents that they served prior to the George W. Bush administration. This does not mean that the presidency has ceased to be rhetorical. Instead, the rhetorical elements of

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[22] Nathan, Richard P. *The Administrative Presidency* (Hoboken: Wiley, 1983).

[23] Lewis, David E. "Personnel is Policy: George W. Bush's Managerial Presidency," in *President George W. Bush's Influence over Bureaucracy and Policy: Extraordinary Times, Extraorderinary Powers*. Edited by Colin Provost and Paul Teske (London: Palgrave MacMillian, 2009): 37.

the presidency have shifted into the domain of presidential powers, which afford the President to strategically navigate barriers to their policies. The specific articulation of presidential powers has a rhetorical element that needs to be understood and analyzed.

The rhetorical presidency as it is presented here is an attempt at such an account. Using insights drawn from rhetorical theory to analyze the texts used to exercise presidential powers, I argue that the rhetorical presidency is much broader than it is typically conceived. Moreover, the rhetorical character of the office of the president has an important influence on the other conceptions of the presidency emphasizing constitutionalism. To provide an account of how the executive branch was modified and subsequently functioned during the terror wars requires binding together the notion of a rhetorical presidency with the constitutional studies of the presidency in a manner that appreciates the norms of democratic practice.

Rhetorical Theories for Presidential Powers

The focus on binding together these categories requires the nuanced deployment of a number of different rhetorical theories. The first of these, which serves the function of both ordering this work and provides the primary means of analysis, is genre theory. The notion of genre is easily maligned because it can appear simplistic and its insights are often misperceived as the simple creation of taxonomies. Contrary to this perception, genre theory offers a nuanced account of historical action that explains how the development of specific modes of speaking can create the conditions for the exercise of governance.

One of the important insights for a study such as this is the delineation between "form" and "genre". As described by Campbell and Jamieson, "form" refers to formal similarities that under repetitive practice constitute a "genre," or a category of speech (19).[24] These genres are by nature situational; rhetors seek to deploy a genre in relation to past speeches and the context which prompts them to speak. Yet the genre is bound by "substantive, stylistic, and situational characteristics (20)."[25] In pursuing genre analysis Campbell and Jamieson hold that the critic is then provided a window into the dynamic tensions between the particular examples within the discourse and its generic whole (21).[26] In other words, the notion of a genre provides a standard by which the critic can evaluate the efforts of a particular rhetor.

Campbell and Jamieson's description gives genre analysis a very dynamic understanding of how discourses change. It acknowledges that these changes can occur not only between the particular and general parts of discourse, but within discourse over time. It is attuned to shifts that could easily be ignored by other types of rhetorical criticism. Within this conception genre analysis is well positioned to respond to the claim that generic criticism does not have much to offer in the way of profound insights. In particular this is true when the question of historicity is raised. As Campbell and Jamieson note, "Ironically, the traditional emphasis on individual speeches and speakers as rooted historically in a particular time and place is, in an important sense, anti-historical, because it fails to recognize the powerful human forces which fuse recurrent

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[24] Campbell, Karlyn Kohrs, and Jamieson, Kathleen Hall. *Form and Genre: Shaping Rhetorical Action* (Lawrence: Speech Communication Association, 1975), 19.
[25] Campbell, and Jamieson, *Form and Genre: Shaping Rhetorical Action*, 20.
[26] Campbell, and Jamieson, *Form and Genre: Shaping Rhetorical Action*, 21.

forms into genres which, in an important sense, transcend a specific time and place (26)." Put more plainly, scholars who limit themselves to studies of rhetoric that emphasize the response to a particular situation ignore the development of norms and expectations for speeches that transcend the specific situation. A more provocative way of phrasing the claim, which is important for this project, is that accounts that do not include a discussion of genre have a hard time explaining what constitutes innovation.

Aiming to make explicit the implicit claim in Campbell and Jamieson's work Miller argues for an understanding of genre as social action. Responding to the claim made by some contemporaries that genre analysis tends only toward the creation of taxonomy with at best limited critical insight, Miller argued instead that genre analysis provides a historical and social perspective lacking in other types of analysis. More importantly, Miller argued that a sound coception of genre should be defined by the consequences of speech in terms of the practices it creates (155).[27] More plainly, there exists a motive in speech that is promoted not just in the language used, but how that language works to develop a set of discourses that support that motive.

What is of particular importance in the approach taken by Miller is the argument that rhetors engage in the use of a genre with a social motive. They do so not to respond to the demands of a situation which is immutable and predetermines the proper response. They do so because they have a "social motive" that prompts them to select a particular means of performing a genre (158).[28] This is not to say that the situation or exigence is irrelevant, but to say that the rhetor has genuine autonomy in how they engage that

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[27] Miller, Carolyn. "Genre as Social Action," *Quarterly Journal of Speech* 70, (1984): 155.
[28] Miller, "Genre as Social Action," 158.

exigence. Inherent in this autonomy is the notion of a motive, a goal that can be satisfied by an engagement. The work of the critic in genre analysis is to identify how the language used operates in and produces genres of speech that advance the motives of the rhetor.

Ultimately what Miller provides is an approach to genre criticism that foregrounds the agency and motives in the rhetor's deployment of a particular speech genre. For this project, which focuses on describing how different genres of speech have been used by Presidents George W. Bush and Barack Obama, this is an important insight in that it can situate those actions, not just in relation to each other but also to acts of past presidents in a manner that discloses the motives embedded in the text. As Campbell and Jamieson put it in *Presidents Creating the Presidency*, "a critical use of genre operates pragmatically to consider ends – that is, the functions or purposes of discourse – and means – the strategies of language and argument through which such rhetorical ends can be achieved (15)."[29] Genre analysis then is not merely the identification of characteristics that can be used to create a taxonomy, it is the analysis of how those characteristics create a shared vision that can subsequently be incorporated into policy.

This is to say that genre is not just descriptive, but normative. The act of identifying genres of speech in terms of the means and ends they accomplish is also to render a judgment on those means and ends. A critical approach to genre takes its exigency from the need to understand the power behind speech, especially in the context of speech that changes a state of affairs through means that exist outside the Aristotelian notion of persuasion. Toward that end, genre analysis is at the same time a practice of

[29] Campbell, and Jamieson, *Presidents Creating the Presidency: Deeds Done In Words*, 15.

categorization and judgment on the desirability of speech practices that emphasizes the importance of the agency exercised by the rhetor in how they approach the genre.

A cautionary note to reliance on generic criticism is necessary here. The hesitancy toward using genre analysis to create a taxonomy is well justified in that it risks creating a sense of stability that is misleading and does not account for the ability of rhetors to reconstitute a genre through their performance. Yet the creation of a taxonomy is an important endeavor. To name a genre, and to define it further, is an act of definition that carries with it important consequences. In naming and critiquing a genre or the particular use of it, the critic is making normative claims about the genre that are no less potent than any other form of criticism. For example, Campbell and Jamieson identify signing statements as a genre that constitutes a "de facto item veto (195)."[30] As will be seen in the chapter on signing statements, this characterization is not inaccurate, but it carries significant consequences. By framing it as a de facto line item veto, Campbell and Jamieson focus the discussion on signing statements around the line item veto, which the Supreme Court has discarded as unconstitutional, and frames the signing statement as a presidential attempt to claim an illegitimate power. This de-emphasizes and risks foreclosing alternative understandings of the genre that focus on signing statements argumentative nature in favor of their institutional power.[31] The act of creating a taxonomy should not be read as a neutral act, but rather as an intervention with its own political and normative judgments.

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[30] Campbell, and Jamieson, *Presidents Creating the Presidency: Deeds Done In Words*, 195.

[31] To Campbell and Jamieson's credit, they do not altogether disregard this use of signing statements in their analysis, instead focusing on how the George W. Bush administration departed from this interpretation. Campbell, and Jamieson, *Presidents Creating the Presidency: Deeds Done In Words*, 205-206.

In analyzing genres of presidential powers defined along the typology tied to names that exist in public circulation this project seeks to explain the norms and tendencies within each mode of analysis. It also addresses the creation of what are termed sub-genres. By sub-genre I mean a repeated form within the genre that is best understood as a particular variety that is developing as a specific form. So, by way of example, executive orders can constitute a genre of presidential powers, but executive orders used to seize assets are a recurring form of executive orders that have certain distinct characteristics that can be identified. This delineation of sub-genres is particularly important in the context of presidential powers that have a longer and more established history

A distinct but important theoretical approach to rhetorical analysis will also play a substantial role in the literature review here. Namely, ideological criticism. One of the profound elements of the way presidents use power is not merely an expression of a particular policy preference, but embedded in that preference is a broader ideological commitment that implicates the role of the president. To make sense of the text of the document, at least a tentative understanding of how rhetoric can engage with ideology is necessary. In the study of rhetoric the explicit turn toward ideology was pioneered by Michael McGee in his study of ideographs. For McGee, ideology "is a political language, preserved in rhetorical documents, with the capacity to dictate decision and control public beliefs and behavior (5)."[32] For McGee the deployment of ideology is primarily performed through the use of ideographs these shorthand forms stand in for

[32] Michael Calvin McGee, "The Ideograph: A Link Between Rhetoric and Ideology," *Quarterly Journal of Speech* 66, (1980): 5.

political philosophy and convey a greater meaning or significance than the literal meaning of the terms used, which enables the consent of the audience by implying an idea without spelling out all of its consequences (6-9).[33]

At play in McGee's conception of ideology and its practice in ideographs is a motive of social control. This approach foregrounds the relationship between the rhetor and the audience in terms of governance, dictating and controlling action. For rhetorical analysis this is a potent concept because it offers an explanation of how the ideas held by the rhetor are sublimated in the language used to direct an audience. For McGee, the ideograph is a tool to control consciousness, as it works within the shared understandings of the shorthand used by both the rhetor and the audience. Following McGee's description there has been a proliferation of rhetorical criticism that emphasizes tracing ideographs embedded in texts to hunt out the means of social control McGee describes in his work.

A productive example that of this work is Dana Cloud's analysis of the role played by Muslim women in the justifications provided by advocates for the War on Terror. In Cloud's view, ideographs such as <the clash of civilizations> were used to produce binary oppositions that produced an identification between the United States public against the Taliban (291-293).[34] As Cloud rightly points out, embedded in this identification was a racialized view of the other that worked through the clash of civilizations ideology to justify violence.

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[33] McGee, "The Ideograph: A Link Between Rhetoric and Ideology," 6-9.

[34] Cloud, Dana. "'To Veil the Threat of Terror': Afghan Women and the <Clash of Civilizations> in the Imagery of the U.S. War on Terrorism," *Quarterly Journal of Speech*90, no. 3, (2004): 291-293.

This approach to the ideograph and its connection to ideology is valid, but reaches a stumbling block when confronted with a political ideology that does not name its opposition in specific terms. To address this problem, my analysis adopts contingently elements of Cloud's approach in reacting to the conditions that drive the use of particular ideographs (which is largely the same in my research) but also attempts to link this ideology to partisan discourses rather than more pervasive grand narratives that give purchase to a more general public consciousness. In Michael Lee's study of George W. Bush's war rhetoric, he highlights the personal and political ideological commitments that drove Bush to describe terrorists as a greater threat than might be empirically justified (13).[35] What is distinctive in Lee's approach that I attempt to capture is the sense that it is not merely an ideograph that can operationalize ideology, but also the use of power that can produce ideology. It was not just that the ideograph or the ideology behind it were presented to the public to shift opinion, it was that the ideology was realized in policy through the actions of the president.

In this approach what changes is the interplay between ideograph and ideology. Rather than functioning as a term that injects an ideological commitment into discourse, the ideograph becomes an operative term that defines a policy. In so doing, the ideograph does not just stand in for an ideology, it becomes the genesis of an ideology. Its role in policy discourse is more immediate and more important than its role in public discourse because it shifts from an intermediary role linking ideology and the public support for a policy to a policy that is supported by an ideology cutting public support out

[35] Lee, Michael. "Us, them, and the war on terror: reassessing George W. Bush's rhetorical legacy," *Communication and Critical/Cultural Studies* 14, no. 1, (2017): 13.

of the model altogether. In this way, the democratic role of the public in vetting an ideology is aborted.

For our purposes, what the ideological critique provides is a means to explain what links together disparate policies through the language embedded in them. Often (although not necessarily always) taking the form of an ideograph, ideology works as a unified mode of thought that animates decision-making processes. What will become apparent in my analysis is the way ideology becomes embedded in the practices of governance through the use of ideographs in presidential powers. By selectively using ideographs, Presidents embed within the administrative and policy formations of the government ideologies that reach beyond the particular decision to shape consciousness about the office of the President and the policy problems facing the country.

As has been described, at play in the contemporary rhetorical practice of the presidency is the use of presidential powers that dissolve the distinction between language and action. Toward that end, there is a need to incorporate a distinct theoretical lens to understand the function of these documents. I turn to speech act theory to provide this lens. From its outset, speech act theory had a natural affinity for genre criticism that is both theoretical (in the insights it provides) and technical (in the way it is written on and described). As Bazerman has noted, social worlds and identities are shaped through participation in recognized speech acts that constitute a genre (17).[36] The utility of speech act theory for analyzing the presidency is an appreciation for how the speech act within the particular context provided by genre works to inaugurate change.

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[36] Bazerman, Charles. "Genre and Identity: Citizenship in the Age of the Internet and the Age of Global Capitalism" in *Rhetoric & Ideology of Genre*. Ed. R. M., Lingard, L., & Teslenko, T. (New York: Hampton Press, 2002), 17.

Speech act theory emerged from the work of J.L. Austin's lectures published under the title *How to Do Things with Words*.[37] At the core of Austin's analysis is an attempt to explain the different ways in which language can be used. The traditional assumption that language works to prompt another to action through describing the world is incomplete for Austin in that it cannot account for the ability of language to inaugurate a changing state of affairs. His famous example is the marriage vow. By saying "I do" the participants in the ceremony (which constitutes an important proper context) create the legal fiction that they are bound to each other in ways that demand a distinct treatment from their interlocutors (6-8).[38] What Austin proceeds to outline is a performative understanding that relies on a relatively straightforward set of circumstances pertinent to understanding how presidential rhetoric functions as a performative.

Of particular concern in our analysis is two insights that derive from Austin's understanding of the performative. First, the performative can only succeed under a certain set of felicitous conditions. These include the position of the speaker, the audience, and the social conditions surrounding the attempt of a performative utterance to play a role in determining whether or not the performative will be felicitous (76).[39] The other elements pertinent to our concerns here are the "tone" of the performative and the "accompaniments (74-76)."[40] In the case of tone and accompaniment, Austin refers to characteristics inherent in a speech and those occurrences alongside the speech that work to confirm the meaning of the utterance.

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[37] Austin, J.L., *How to Do Things With Words* (Oxford: Oxford University Press, 1967).
[38] Austin, *How to Do Things With Words*, 6-8.
[39] Austin, *How to Do Things With Words*, 76.
[40] Austin, *How to Do Things With Words*, 74-76.

In short, Austin provides a definition of the performative utterance that has a remarkable kinship to the genre approach described above. In both cases, the theory is a pragmatic attempt to describe how language functions in practice rather than in theory. Both work by creating classifications that are subsequently used to analyze the function of the genre. The operative genres present in Austin's work describe the three different varieties of the performative. The first is locutionary, an act through language that is able to convey meaning through the use of shared understandings of sound, manner, and meanings (95-98).[41] The second, which will preoccupy my analysis, is the illocutionary. The illocutionary is the performance of an act in the saying of it (99-100)[42]. The third is the perlocutionary act that draws on the force of either a locutionary or illocutionary act to create consequential action by others (102-107).[43]

These distinctions enter our analysis in two important ways. First, the categorization of different kinds of speech acts provides a rational basis for understanding what it is that makes presidential powers expressed through language consequential. Because the president, especially in the constitutional formulation of unitary executive theory, is the embodiment in an individual of the entire executive branch, all speech by the president is at the same time illocutionary and perlocutionary. When a president issues an executive order, the order is illocutionary in that it initiates a new state of affairs that requires consequential action by other bodies. Second, the illocutionary and locutionary distinction provides a delineation between speech that embodies change, and speech that must have that change result from the action and decision from other actors.

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[41] Austin, *How to Do Things With Words*, 95-98.
[42] Austin, *How to Do Things With Words*, 99-100.
[43] Austin, *How to Do Things With Words*, 102-107.

For example, when we look at directives to the executive agencies issued by the President, one of the important elements is not just what is commanded, but the norms that accompany that command, which are locutionary elements that have persuasive power embedded within the language used.

An important debate followed from Austin's work that bears strongly on future chapters. This debate proceeds in two parts. The first side of the debate is the work of J.R. Searle to expand on the notion of a speech act.[44] Searle's elementary insight is to expand the notion of the social that surrounds the circumstances under which speech acts can be used. The important insights from Searle are twofold. First, Searle has an insight that parallels the development of the practices of a presidency. Searle points out that there are two types of rules that work simultaneously to make a speech act functional. The first is regulative; it is a rule that governs how a speech act must be performed to be successful. The second is constitutive; it is a rule that creates the conditions under which a speech act can succeed. His example is productive. He points to the rules regarding football. At the same time, the rules regulate how the game may be played and make the game possible. Without the rules in football the game itself would be different. In the same way, a speech act is ultimately reliant on rules serving both functions in order to function correctly (33-34).[45]

I pause here to point to the problem that the presidency poses to this line of thought. The persons who are playing the game are also the ones making up the rules

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[44] It is worth noting, there was a great deal of work to be done. Austin passed away without publishing his work on speech acts. His text *How to Do Things with Words* was developed after his death from his lectures given at Harvard in 1955.

[45] Searle, J.R. *Speech Acts* (Cambridge: Oxford University Press, 1969), 33-34.

while they play. Although persons exist who are potential referees, the players themselves do not have a default authority to which they must submit when challenged. Instead, they have the ability to make arguments that can change the rules.

The second insight from Searle is the development of the notion of iteration and institutional facts. For Searle, in order for an institution to function, it requires the ability to be iterated. In other words, for the president to act, his act must be expressible in language within the coordinates of his authority. This requires the preexisting institutional fact, but then gives the president broad authority to act so long as that act operates within the existing institutional facts. Certainly those facts are malleable (and Searle argues in many cases arbitrary) but flow from the ability to iterate those facts in a manner that is institutionally recognizable to ones interlocutors (79-82).[46] Importantly, Searle goes further, to argue that to the extent that language has the ability to change an institutional fact (or even to create an institution) it must function within language to harness a collective intentionality (37-42).[47] For my purpose, the important insight here is that in order for a speech act to function to change an institution (such as the government), it must exist within the language of the government, and use a collective intention already possible within the language to initiate change. As will be demonstrated in the following chapters, it is not the case that the president can act unilaterally or that the speech acts that presidents use are inevitably successful, but rather that a collective intention exists that permits that success.

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[46] Searle, J.R. *Social Construction of Meaning* (Cambridge: Oxford University Press, 1995), 79-82.
[47] Searle, *Social Construction of Meaning*, 37-42.

There is another side of the debate that comes from the work of Derrida. Writing in a direct response to the work especially of Austin, but including Searle as well, Derrida attempts to articulate a distinct approach that departs from the notion of iteration. Broadly, Derrida's argument is that Austin and Searle focus overmuch on the intention of the speaker, when in reality the intention of those surrounding the speaker and the context of the speech exerts a greater control. Thus, rather than the practice of iteration producing norms and institutions, norms and institutions are called into existence through the citing of their past uses.

The root of Derrida's argument informs my approach to speech acts. For Derrida, it is not what the speaker intends by their act, but rather the conditions that would deny the possibility of that act's success which makes it significant. The example emphasized by Derrida is the signature. In Derrida's view, the idea that a performance can be engaged in the absence of the speaker, as in the case of a signature on a legal document, demonstrates that language is not so tightly bound to the context of the utterance as it is by the impossibility of that utterance. Because the speaker is not present to make the meaning clear, yet the document can be and is read and validated by the signature, it is more a question of how the empirical presence of the author is grafted onto the document that determines its nature than it is the propriety of the document (19-21).[48]

Derrida expands on this notion in an extended response to Searle, arguing that the focus on the speech act in the intentionality of the author misplaces agency. As Derrida writes, "The sender and the receiver, even if they were the self-same subject, each relate

[48] Derrida, Jacques. *Limited Inc.* Ed. Gerald Graff. Trans. Jeffrey Mehlman and Samuel Weber (Evanston: Northwestern University Press, 1988), 19-21.

to a mark they experience as made to do without them, from the instant of its production or of its reception on; and they experience this not as the mark's negative limit but rather as the positive condition of its possibility (49)."[49] In other words, the function of the "mark," which here refers to a specific example of a speech act, is not reliant on the empirical presence of the author or intended audience. Instead, because writing (and language more generally) is made so that it can function without reliance on a particular subject, there is no need to presume the authority of the author for an act to have success. The power in the act is in the ability of it to be put to work without reliance on the presence of the speaker. Put into the language of ideology, even if the author is not present to validate its meaning, ideology satisfies that function by giving meaning to the language used.

This will become important for my analysis. When a president acts, they do so in a manner that is not reliant on their person or their ability to make meaning clear. Instead, it is an operation through language that is subject to the use of that language. In this way, Derrida's emphasis on citationality becomes important. The ability to defer to a specific language outside of the document opens up the possibility for meanings which exist outside of the text to overpower it. For this reason, when a president acts through the use of presidential powers, they do so not only (or perhaps merely) in satisfying the condition of a speech act, but call on a language apart from the text to give that language its meaning.

This complicates the role of the critic but gives a richer sense of the import of the position of the speaker. Although the president is not present, by appending their

[49] Derrida, *Limited Inc.*, 49.

signature they indicate their empirical presence, yet rely on the broader operations of language for their meaning to be conveyed. Toward that end, it is not merely polysemy that pervades the function of the document, but the hermeneutic action of the participant that takes up that document. For scholars, such as this one, concerned with explaining how presidential powers work, the task is not merely to track the intention of the president, but to follow the citations in the document.

Derrida ultimately provides two senses that augment how I approach speech act theory.[50] First, for pragmatic analysis there is a need to account not just for practices of iteration, where Presidents enact again an established process, but also practices of citationality.[51] In changing policy, Presidents draw as much on the ability to harken back to speech practices that precede them as much as they do on the creation of new practices. The tendency in the conception of speech act theory as practiced by Austin and Searle to focus on the production of new realities is important, but must be nuanced to account for the ability of Presidents to rearticulate established reality. Second, Derrida provides a distinct sense of the institutional context in which presidential powers are used. Where Austin and Searle's approach emphasizes formalistic contexts in the act, Derrida emphasizes and foregrounds a practice of drawing together disparate elements that are subsequently reconstituted in the text. In reconstituting these elements the text becomes subject not just to the elements it draws upon but the institutional attachments

[50] This is not to say that other possible insights are not available, but that in the view of the author these insights do not bear substantially on my analysis.

[51] Although there are some contradictions in this mixed approach, those contradictions tend to rely more on the situational applications of the theory, rather than on their universal claims to truth or falsehood. Thus, with some caution, my analysis will selectively apply both approaches, relying on the markers in the text to rely on which theory provides the better explanatory tool.

different audience members have to those elements. In my analysis, where appropriate, I attempt to highlight some of the divergent functions of those institutional attachments.

The Unitary Executive

One of the inherent difficulties in studying the use of presidential powers is the nearly monolithic role played by constitutional thought and critique that surrounds it. For the purposes of this project, which seeks to provide an alternative approach that can work symbiotically with a constitutional critique of presidential powers but is not reliant on comparison to the Constitution in order to explain presidential action, this line of thinking creates a barrier that must be specifically situated. Disavowing the typical role afforded to the Constitution as an objective external measure of the legitimacy of presidential action, this analysis foregrounds the role the Constitution plays in constructing the institutional facts that animate the articulations of presidential powers.

The theory that has organized these institutional facts to guide Presidents Bush and Obama toward the expansive use of presidential powers evident in the terror wars has come to be titled Unitary Executive Theory (UET). This mode of constitutional thought has been a core part of conservative political thought in the United States since at least the Reagan administration. One of the better academic defenses of the use of this theory under the George W. Bush administration is provided by Stephen Knott. In Knott's view UET is a theory that has no partisan home, it lends itself as well to presidents from the Democratic Party as it does to Republican Party presidents (5).[52] Indeed, although Obama has taken a stance against an expansive presidency, he has quietly continued to

[52] Knott, Stephen F. *Rush to Judgment: George W. Bush, The War on Terror, and His Critics* (Lawrence, University Press of Kansas, 2012), 5.

use it as a "lite brand (83)."[53] Knott argues that what was remarkable was not the powers Bush used but instead the political conditions, including congressional meddling, an assertive judiciary, and Bush's inability to articulate (in Knott's case both literally and figuratively) a compelling defense of these powers that resulted in their unpopularity and the critical attention they have garnered (92-93).[54]

Despite this critical attention, non academic audiences could be excused for being somewhat unfamiliar with the title and its meaning, as it does not itself constitute a commonsense understanding of the Constitution, but instead is a particular interpretation that in substantial ways oversteps the normal understandings of the executive branch. The most straightforward explanation of the theory comes from Rudalevige who writes, "unitary executive theory, most basically, posits that the executive power vested in the president cannot be infringed upon by other political actors (250)."[55] The sticking point, as Rudalevige points out, is just how far the authority for the executive really extends. As my analysis will demonstrate, the Bush administration generally saw this authority as essentially boundless, while the Obama administration had a generally more restricted approach that, nonetheless, participated in the same practices.

This expansive definition has found its own justification in both academic and political contexts. The contemporary expansive view of executive power is rooted in a particular interpretive approach to the Constitution. Supreme Court Justice Antonin Scalia argued that an originalist interpretation would be grounded in concepts familiar to

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[53] Knott, *Rush to Judgment: George W. Bush, The War on Terror, and His Critics*, 83.
[54] Knott, *Rush to Judgment: George W. Bush, The War on Terror, and His Critics*, 92-93.
[55] Rudalevidge, Andrew. "George W. Bush and the Imperial Presidency," in *Testing the Limits: George W. Bush and the Imperial Presidency* (Plymouth: Rowman and Littlefield Publishers, 2009), 243-261.

how the framers of the Constitution would have intended that section to be interpreted. In this case, all the powers reserved for the King in the British system would also be reserved for the President, as the British system was responsible for framing how Executive powers were understood (858-860).[56] The hermeneutic approach taken by originalists lends itself to a very expansive view of executive powers, including the ability to make war without any control or restriction from Congress.

This distinctive approach to interpreting the Constitution has had significant support in unlikely places. As noted by Vanessa Beasley, this interpretation has gained support in unlikely places because of the expediency for many Presidents in avoiding Congress (13-14).[57] The expansive view of the executive branch, although not unrelated to claims that expanded Presidential power dated to the New Deal era, gained new life under the Reagan administration in memoranda written by the Reagan administration lawyers. As Amanda Hollis-Brusky notes, this definition was rearticulated and most clearly described by Executive branch lawyers of the Bush Administration, Deputy Assistant Attorney General John C. Yoo who argued that the Executive was obligated to maintain unity of purpose especially in the face of a global terrorist threat (197-198).[58] This unity could only be sustained if the Executive had the ability to compel all branches of the government and the military to function in a synchronized manner.

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[56] Scalia, Antonin. "Originalism: The Lesser Evil." *University of Cincinnati Law Review* 57, no. 849 (1989): 858-860.

[57] Beasley, Vanessa. "The Rhetorical Presidency Meets the Unitary Executive: Implications for Presidential Rehtoric on Public Policy," *Rhetoric & Public Affairs* 13, no. 1, (2010): 13-14.

[58] Hollis-Brusky, Amanda. "Helping Ideas Have Consequences: Political and Intellectual Investment in the Unitary Executive Theory, 1981-200." *Denver University Law Review* 89, no. 1, (2012): 197-198.

In his article "War and the Constitutional Text," Yoo argues in particular that all war powers should reside in the Presidency and should not be subject to any restraints imposed by other branches (1).[59] Yoo holds that those adopting the "pro-Congress" position, that the Executive war powers should be subject to checks and oversight by Congress, rely on historically inaccurate analysis of the intent of the framers of the Constitution, which has produced a fatal flaw in rejecting a more expansive vision of the war powers given to the President under Article II of the U.S. Constitution (22-23).[60] To the extent that Yoo is willing to grant Congress any check on the war-making capacity of the President, it is through the power of the purse (37).[61] In this way Congress is able to restrict unpopular wars, without interfering ultimately with the ability of the President to make decisions, which Yoo considers crucial to the framework for how the United States conducts its foreign policy (38).[62] This decision-making framework, Yoo argues, is necessary in order to respond to the contemporary threats posed by terrorism, which demand that the President be able to respond quickly and effectively to perceived threats (41).[63] This emphasis on unity and expansive executive decision-making is significant, as it creates an enthymematic belief that the Executive embodies and represents the whole of government, rather than a branch with limited powers.

Within the literature defending UET there is a persistent return to the text of the Constitution as justification for the theory, but the arguments made for the desirability of the theory do not correspond to the reliance on the Constitution as a justification. Knott's

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[59] Yoo, John C. "War and the Constitutional Text." *University of Chicago Law Review* 69, (2002): 1.
[60] Yoo, "War and the Constitutional Text," 22-23.
[61] Yoo, "War and the Constitutional Text," 37.
[62] Yoo, "War and the Constitutional Text," 38.
[63] Yoo, "War and the Constitutional Text," 41,

argument stems from a need to correct perceived historic errors through the assertion of a distinct constitutional theory. Scalia grounds this theory in a limited and partial understanding of discourses on the Constitution at the time of its founding. Yoo's argument has as much to do with the technical demands he perceives necessary to fight the War on Terror as it does with a broader constitutional interpretation. What these arguments demonstrate is a tendency to view the Constitution as a document that can provide a rationalization for an ideological commitment to an empowered presidency. Toward that end, UET is a normative approach to the Constitution that has proved to have deleterious effects for democratic practice.

As understood by the George W. Bush administration UET aspires to the constitutional equivalent of French King Louis XIV's purported claim "*L'etat c'est moi.*"[64] The office of the president is literally conceived of as the state embodied in an individual. It is not merely that the president is the unifier, but that the president embodies the unity of the polity. This broad grant of authority, envisioned by the Bush administration begs comparison to a distinct theoretical insight that moves beyond the question of constitutionalism that will preoccupy much of my analysis.

Although the majority of my analysis in this project seeks to analyze how UET has come to be operationalized, there exists an alternative approach that also animates my criticism of the terror war Presidents. Known as constituent sovereignty, it is in many ways an ideological foil to UET. Discussed at greater length in the conclusion,

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[64] Rowen, H.H. "'L'etat C'est Moi': Louis XIV and the State," *French Historical Studies*. Vol. 2, no. 1, 1961 pp. 83-93. Attribution of this quote to Louis XIV been rightly problematized due to lack of genuine evidence. Realistically the best interpretation may be Rowen's claim that Louis XIV believed it even if he did not say it.

constituent sovereignty is the concept that the will of the people constituted by the founding document is the ultimate source of legitimacy by which government action should be measured.

A core argument in my analysis is that in the terror wars, the presidency, as Dana Nelson has argued, has proved to be bad for democracy. The concern in my analysis is that the organization of the institutional facts of the Constitution in UET undermines democratic practices and ignores the role of the constituency in the organization of those facts. As Nelson argues, an over emphasized and over empowered presidency risks reducing democratic practice to the quadrennial act of voting (16-17). Such a model, with its impoverished sense of democracy, has the effect of depoliticizing the population and has contributed to the ongoing character of the terror wars. Of more importance, it has raised the question of the legitimacy of the office of the President when the office has grown so powerful that it no longer reflects a democratic will.

I argue that this is a fundamental error in the constitutional thought that supports UET. It presumes that a constitutional basis is sufficient to justify the actions of the President. Such an approach has led Presidents to exercise extraordinary power and pursue wars that have proved to be disastrous. The means used to pursue these wars have proved ultimately to be anti-democratic, and the consequences are borne out in the legacy of criticism against President Bush that Knott identifies, and whose analysis should also be a blemish on the legacy of the Obama administration.

Sovereignty

One of the profoundly difficult terms to define at the core of political thought both inside and outside of constitutionalism is sovereignty. One of the foundational principles in the way the Constitution is understood relies on the notion that powers are separated. Problematically, the practice of governance, even in states that rely on democratic and constitutional governance, makes a genuine and immutable separation difficult. In the case of the United States, I argue, there resides an inevitable potential for breaking down this separation spawned from the existence of sovereignty.

As German jurist Carl Schmitt famously defined it, "Sovereign is he who decides on the exception (5)."[65] This definition in its initial presentation is not prescriptive, but rather describes the way violence is deployed. Sovereign power is responsible for wielding the violence necessary for the maintenance of law. From the outset, Schmitt defines sovereignty as a borderline concept, not that it is vague, but that it is not routine (5).[66] There is an accepted order that governs the functioning of the state. Fundamentally this order does not rely on sovereign power. In the main, laws are made and maintained following an order defined by an abstract understanding of sovereignty. Through this abstract acknowledgment of sovereignty, law is maintained and made without the need of a sovereign (1985, p. 5-7).[67] The sovereign governs without the need for violence because the juridical order exists.

Sovereign power is demonstrated in creating exceptions to this accepted order. An exception cannot come from outside the order because it would not have the authority to

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[65] Schmitt, Carl. *Political Theology: Four Chapters on the Concept of Sovereignty*. (Cambridge: MIT Press, 1985), 5.
[66] Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, 5.
[67] Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, 5-7.

wield sovereign violence. Rather, the sovereign creates exceptions that stand outside of the order. As Schmitt explains, "The exception, which is not codified in the existing legal order, can at best be characterized as a case of extreme peril, a danger to the existence of the state, or the like. But it cannot be circumscribed factually and made to conform to a preformed law (6)."[68] The exception is not a routine power exercised by sovereignty. It is the instantiation of martial law to maintain order or to prepare for conflict.

At this catastrophic point the nature of sovereignty becomes most clear, Schmitt adds:

> The most guidance the constitution can provide is to indicate who can act in such a case. If such action is not subject to controls, if it is not hampered in some way by checks and balances, as is the case in a liberal constitution, then it is clear who the sovereign is. He decides whether there is an extreme emergency as well as what must be done to eliminate it. Although he stands outside the normally valid legal system, he nevertheless belongs to it, for it is he who must decide whether the constitution needs to be suspended in its entirety (7).[69]

Schmitt is criticizing the reliance on a constitution to as a means to determine how a crisis should be addressed. In Schmitt's view a constitution at best can identify who should make the decision to suspend the normal functioning of the government to address the crisis, creating an exception in the normal state of affairs. Thus, the sovereign's ability to make the decision regarding what constitutes a crisis is necessarily unlimited, and the power to render subsequent decisions about how to address the crisis is similarly unlimited. This vision of sovereignty carries with it two distinct implications. The first is that the power of the sovereign to decide on the exception is remarkably absolute and is

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[68] Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, 6.
[69] Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, 7.

beholden only to the capricious will of the person who wields the power of the sovereign. The second is that the ability of the sovereign to exist outside the legal system to be able to suspend and yet be bound to the legal system creates a source of power that is not well accounted for in a system defined primarily by the existence of checks and balances.

The lingering concern is the relationship between sovereignty and violence. Sovereignty, especially in the context of signing statements, deploys a violence that exists outside of the juridical order. This divine violence should be read, as Schmitt argues, in a secular manner. Violence does not necessarily mean military violence against rebels (although that would certainly qualify), but instead it is violence that suspends the protections that make the juridical order function. An example, such as the internment of Japanese citizens during World War II, demonstrates the more extreme version of sovereign violence. However, more subtle forms of violence, such as the executive resisting normal standards for congressional oversight, qualify as well. Divine violence in this context always carries with it the latent threat of real violence, but may not always take that form.

Modern discourses on sovereignty are framed by the tension between Carl Schmitt's defense of central state power and various criticisms of it. As Agamben has argued, Schmitt's argument about sovereignty was created in response to the work done by Walter Benjamin (52).[70] Understanding this debate in simple terms helps to clarify the way sovereignty comes to be defined.

In his early work Benjamin argues that a concept of violence outside of the state is necessary to explain history; violence often originates outside of the state's normal

[70] Agamben, Giorgio. *State of Exception* (Chicago: University of Chicago Press, 2005), 52.

functioning (281-283).[71] He concludes that despite violence existing outside the law it is always engaged either in making law or in preserving law. These two ways of deploying violence are dialectically opposed with one generally taking precedence over the other (283-286).[72] These first form of violence is mythic in character. Mythic violence is controlled by people, pernicious, and transitory, a violence used to create interventions to make and sustain an existing law. It is violence borne out of the myth attached to the formation of a polity. This is contrasted with divine violence, which is sovereign and stands above and outside of all other forms of violence (297-298).[73] This divine violence that exists outside of the state, either as an extra-legal form of violence carried out by state apparatuses or by illegal violence carried out by non-state actors.

Benjamin's use of legal contracts is constructive as a way to understand the nature of violence. The violence of law making and sustaining are represented in the legal functioning of a binding contract. By agreeing to and maintaining a contract, both parties are violent in that they foreclose other possibilities. However, there exists a divine violence that lies outside the contract, which is what allows for a contract to be dissolved when it no longer serves its intended purpose (286-288).[74]

As Agamben points out, Carl Schmitt's reply is an attempt to place this divine violence inside the juridical order (54).[75] As Benjamin places sovereign violence outside of law as the way a divine violence asserts order with no tie to law, Schmitt wants to

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[71] Benjamin, Walter. *Reflections: Essays, Aphorisms, Autobiographical Writings*. Ed. E. F. N. Jephcott, and Peter Demetz (San Diego: Harcourt Brace Jovanovich Publishers, 1978), 281-283.
[72] Benjamin, *Reflections: Essays, Aphorisms, Autobiographical Writings*, 283-286.
[73] Benjamin, *Reflections: Essays, Aphorisms, Autobiographical Writings*, 297-298.
[74] Benjamin, *Reflections: Essays, Aphorisms, Autobiographical Writings*, 286-288.
[75] Agamben, *State of Exception*, 54.

explain this same violence as a tool of sovereignty that operates inside a juridical order. This prompts Schmitt to create the notion of violence as something that is inside the order while simultaneously outside of it.

Schmitt begins his reply to Benjamin by making clear the technique Benjamin uses to describe violence. In *Political Theology*, Schmitt makes the bold claim that all modern political thought is secularized theology. This clarifies the discussion offered by Benjamin of sovereignty. The decision to associate sovereign violence with the divine is deliberately intended to create an analogy between the sovereign and divine power. Enumerating two important characteristics of this analogy clarifies the applicability of Benjamin's definition, and Schmitt's modification of it.

The first characteristic Schmitt points to is the unitary nature of the divine, which is transcribed onto the sovereign by Benjamin. This unitary view makes clear that the sovereign is inherently undemocratic in this view because there is no space for opposition or dissent. Schmitt goes a step farther, arguing that where decisions are made by groups of people, they lack the sense of rightness that emanates from the decision made by a "personal sovereign" (49).[76]

The second important characteristic of this analogy is the notion of omnipotent power and absolute decision. Although it is mentioned in *Political Theology*, Schmitt declines to elucidate this characteristic until his next work. In *Concept of the Political*, Schmitt argues that the omnipotent nature of this power is created by the need to define

[76] Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, 49.

an enemy (25-27).[77] Schmitt argues that the need to have the ability to declare and conclude is the primary goal of the political, which is defined by the need to begin and end conflict. Conflict may only be concluded or conducted by the sovereign, as war requires the suspension of the juridical functioning of society so efforts may be focused on preparing for war.

Benjamin tells us that law is intimately tied to violence. The application of violence sustains law by providing punishment when the law is violated. To change the law requires a different kind of violence, either revolutionary violence in a complete unmaking of the juridical order or through violence done against the law by the legislature changing it. Distinct from these two types of violence is a third kind that provides the fundamental grounds for sovereignty.

It is no coincidence that Schmitt was writing the juridical foundation for what would become Nazi style fascism. As Geoff Waite argued, Schmitt was concerned with the need to maintain a distinction between the ruler and the ruled so that order may be maintained (115-116).[78] Waite points out that Schmitt's commitment to Nazism is both complex and instructive in understanding sovereignty. Schmitt was committed to the leadership offered by the Nazi policy, but was disturbed by its racist and, in many cases, its arbitrarily targeted policy. He envisioned instead a fascism more like that found in Italy where commitments to ideologies premised on race was a political non-starter (128-

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[77] Schmitt, Carl. *The Concept of the Political.* Trans. George Schwab. (Chicago: University of Chicago Press, 2007), 25-27.

[78] Waite, Geoff. "Heidegger, Schmitt, Strauss: The Hidden Monologue, or, Conserving Esotericism to Justify the High Hand of Violence," *Cultural Critique* 69, (2008): 113-144.

130).[79] He affirmed the system of governance created by fascism, but was frustrated by the political and ideological choices made within the system.

Agamben agrees to aspects of the definition of sovereignty offered by Schmitt. For Agamben, the sovereign is still the body that is able to decide the exception, and this decision is necessarily absolute. Where Agamben calls into question the definition offered by Schmitt is the location of the sovereign in the case of the exception. For Agamben, the sovereign always has a relation to the rule, but uses the exception as a means to modify this relation. Rather than the sovereign being inside the juridical order and suspending it, as Schmitt would argue, Agamben contends that the exception should be understood as the sovereign taking itself outside of the order as well as the decision to create exceptions that suspend the normal functioning of the order (17-18).[80]

Accepting Schmitt's argument in favor of giving this power to the sovereign so the state may inaugurate an exception during times of crisis, Agamben asks a more basic question. Why do we need the state? To answer this question he turns to the implicit critique of Schmitt's position offered by Foucault. Agamben contends that the state exists not to prevent the Hobbesian state of nature that concerns Schmitt; rather, the state exists as a means to incorporate subjects in a manner that brings them into a political relation to the state (5-7).[81] The aim of the state is to create political subjects who are

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[79] Waite, "Heidegger, Schmitt, Strauss: The Hidden Monologue, or, Conserving Esotericism to Justify the High Hand of Violence," 128-130.
[80] Agamben, Giorgio and Daniel Heller Roazen (Trans). *Homo Sacer: Sovereign Power and Bare Life*. (Stanford: Stanford University Press, 1998), 17-18.
[81] Agamben, *Homo Sacer: Sovereign Power and Bare Life*, 5-7.

incorporated into the state such that the state may function in a manner that best serves the population (8).[82]

This vision of the state and its relation to the population intuitively sounds reasonable. In the U.S. legal and philosophical tradition there is a strong presumption that more political participation is good. However, there is an underside to such a system that makes it not so distinct from the authoritarianism that it opposes. The underside of liberal democracy begins with the decision to value life. Citing Foucault, Agamben claims that liberal democracy begins with the presumption that life has value; therefore, violence, even against the population, is legitimate in its defense (3).[83] The very logic that allows the liberal democratic state to maximize life is also the logic that permits the limiting and taking of it. The conduit between the state and life is the sovereign who intervenes in the juridical order on the behalf of life. By deciding on the exception, the sovereign intervenes both in favor of, and against, life.

Sovereignty's ability to determine the exception is not as clear as the definition of sovereignty implies. As Agamben claims, the juridical order is no longer the only realm where sovereign decisions are exercised (122).[84] Sovereignty is increasingly concerned with the efforts of science, medicine, religion, and social sciences to maximize life. This expansion demonstrates that though the definition of sovereignty is clear, that clarity does not translate in to a clear limitation on power. Indeed, the nature of sovereignty as a borderline concept insures the strategic articulation of sovereignty in such a way that its

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[82] Agamben, *Homo Sacer: Sovereign Power and Bare Life*, 8.
[83] Agamben, *Homo Sacer: Sovereign Power and Bare Life*, 3.
[84] Agamben, *Homo Sacer: Sovereign Power and Bare Life*, 122.

borders expand and contract to expand the reach of the sovereign in a manner designed to serve the sovereign rather than the population.

The preceding section may in some ways appear out of place in this project by beginning the argument not with the question of language and constitution, but rather with the question of sovereignty. Despite the odd appearance, this decision was intentional. Contemporary constitutional thought seems simultaneously disconcerted by, and increasingly reliant on, the need for a state of exception to be coded into constitutions. Although many theorists are more than ready to abandon Schmitt's view that a clearly defined and explicitly sovereign branch be created, this feeling is countered by the natural dilemma of just how government should change to address threats to the survival of the government. Here my contention is that reading Schmitt's definition descriptively, rather than prescriptively, allows it to be used as a diagnostic tool, rather than as an ideal against which contemporary governance is measured. Once diagnosed, the work done by Agamben and Benjamin contextualize and problematize the relationship between sovereignty, violence and the law.

In short, what this section has done is make clear what the stakes are for the shortcomings in contemporary constitutional thought. The power of language and the privilege given to the executive branch to wield it in our contemporary political moment insures that sovereignty remains the foremost theoretical and political concern for constitutional thought. This makes the stakes for understanding the relationship between the constitution and language remarkably high, and if Agamben is to be believed, the stakes are human life itself in a literal sense.

Ultimately, a theory of sovereignty provides a means to explain the theoretical relationship between the actions a president takes which are formally outside the Constitution and the source of legitimacy for presidential action embedded within the act of constituting. This relationship is expressed through the exercise of power by a body couched in the need for a power to take control of a situation in a manner that the contemporary configuration of government does not permit. In the case of the terror wars Presidents Bush and Obama in their turn would both exercise this power in a manner that was demonstrative of a source of power that existed outside of the Constitution.

The concern which preoccupies a consideration of sovereignty is the existence of an extraconstitutional ideological commitment embedded in the policies and institutional discourses of the executive branch. Although the critiques of this commitment have been (rightly) targeted at the George W. Bush administration, this project will illustrate that the same commitments were also present in the Obama administration. In both cases, presidents found a source of power outside the Constitution, which worked to minimize the role of the Constitution, in order to assert presidential supremacy.

Chapter Plan

Subsequent to this introduction and overview, I shall analyze the use of three types of presidential powers used by both terror war Presidents. In keeping with the genre oriented analysis described above, the chapters follow a taxonomy of presidential powers. This organizational structure is the result of the clear delineation among different presidential powers that serve the organizational interests of this dissertation, but also point toward the strategic value provided by each of these powers to the

President. In keeping with a central theme of the dissertation, the organizational structure reflects the differences in how each of the presidential powers are used by presidents.

The first chapter addresses the specific question of signing statements. The signing statement became a hallmark of the George W. Bush administration with which the Obama administration had a more uncomfortable relationship. The signing statement, uniquely able to intercede into the legislative process in a way that was difficult either for Congress or the judiciary to respond ,to provided Bush a remarkable degree of flexibility to argue for and exercise control over policy while expanding the power of the executive branch. The Obama administration used these powers, but expressed a degree of concern that was absent from the Bush administration. Because the development of signing statements is a relatively recent turn of events that was largely established by the Bush administration, this chapter explores the development of their use over time.

In the use of signing statements both Presidents asserted a sovereign power by interceding against congressional action through a means that had no recourse. Because signing statements are not reviewable by the courts and cannot be overturned by Congress, they are a remarkably powerful genre of presidential powers. The Bush administration used them as a means to semi-secretly and incontrovertibly undermine the role of Congress in determining policy. The Obama administration continued this practice, but changed the argumentative approach away from the emphasis on constitutional interpretation to dramatize the threat posed by terrorism toward an approach that emphasized pragmatic governance in changing the direction of U.S. policy.

The second chapter focuses on a genre that is particularly particularly difficult to define known under the Obama administration as Presidential Policy Directives. These directives, issued to direct the federal agencies tasked with foreign policy and the military, are used to outline the policy aims of the presidency, and in some cases, provide specific instructions. Because of the norm to classify these directives, the public cannot know their content outside of leaks or later declassification, giving presidents a latitude to act that is difficult to limit. The result is a particular exclusion from potential democratic practices in the context of foreign policy and played an important role in how the Bush administration pursued the terror wars and how the Obama administration tried to end them. In both cases, the Presidents used Presidential Policy Directives to assert a sovereign role in the particular area of foreign policy that did not have to comport to norms of congressional oversight.

This second chapter also marks a distinction between signing statements that is shared in the third chapter which explores executive orders. Because Presidential Policy Directives and executive orders have a longer history of consistent presidential use and do not respond to congressional action, distinct ways have developed to use them that can be classified and defined in terms of sub-genres. These sub-genres are defined by directives and orders that serve similar functions and therefore have similar characteristics. To address these sub-genres I focus less on the historical development of their use than the nature of the controversies they were used to address.

The third chapter focuses on the most publicized genre of presidential powers, the executive order. This chapter argues that although the executive order is public, and

acknowledged, the inherent power it offers to the president creates the possibility for a an expansive and personal power. In this chapter I focus on how the language used in executive orders created the infrastructure and were a personal weapon for both Presidents George W. Bush and Obama to pursue the terror wars. This power reflects an important element of sovereignty, the ability to engage in the formulation of policy and action without involving Congress, the courts, or the public. As such, the executive order exists apart from the constitutional order in a manner that gives the President sovereign authority over the formulation of policy.

In the conclusion I offer an alternative framework for understanding presidential action that attempts to account for both the traditional rhetorical fields of analysis and the newly created problems posed by the advent of an emphasis on the personal power of the President. The proposal I argue for is a gesture toward what Beaumont describes as civic constitutionalism, a theory designed to incorporate a notion of popular sovereignty and a respect for the Constitution as a measure of the appropriateness of presidential action. I argue that what is needed is a reframing of the relationship between the Constitution and the constituted that empowers the public both formally and informally to critique and review the actions taken by presidents.

In these chapters the emphasis is placed on how both the terror war Presidents engaged in the practice of sovereign power through the selective use of distinct genres of speech. The point of inflection in my analysis is less the question of constitutional configuration for the sake of the Constitution. Rather it is how the rhetorical presidency, always understood as a way to perform the office, that has had a malleable relationship to

the Constitution, was altered in a manner that undermined its compelling democratic elements.

In pursuing the terror wars both Presidents engaged in similar uses of presidential powers, but had clearly different policy views that were expressed in the content their respective presidential power documents. These differences are not inconsequential, but do not preoccupy the majority of my analysis. Instead, the following chapters attempt to detail how both Presidents transformed the rhetorical elements of the rhetorical presidency into presidential powers. By understanding the means used by both Presidents a more lucid picture emerges that explains why the presidency itself has become a flawed institution from the standpoint both of formulating policy and limiting the possibilities for democratic practice.

Chapter 2: Signing Statements

To a casual observer it may seem commonplace for a president to make a statement on signing a piece of legislation passed by Congress. If a piece of legislation is significant, the President might give a speech commemorating passage and even attempt to frame how the public understands the legislation. Occasionally presidents will even hold large ceremonies, signing their name with many different pens that are given as souvenirs of the event. From a constitutional point of view, such an event, though perhaps not in keeping with the revolutionary tradition of a more humble presidency, seems to be at least relatively innocuous.

Beginning under the Reagan presidency and continued under subsequent presidencies, the practice of issuing a statement or holding a ceremony on signing a piece of legislation became a more significant and dubious constitutional presidential practice. Counter to the concerns of the early presidents, the greater problem was created by a decline in the use of orally delivered statements in a ceremonial context. The more subdued and secretive approach attempted under the Reagan administration and recast as a more aggressive practice during the George W. Bush administration demonstrated that the real power of the signing statement was not merely to control how the public perceived governance, but rather in governing through interpretation. Understanding this shift in how signing statements have been used is one of the keys to understanding how the presidency functions in the terror wars. Reading these statements as a distinctive genre helps explain why their function changed during the terror wars while retaining the earmarks of earlier statements.

My analysis of these statements as a genre focuses primarily on the arguments that typify the genre, which change significantly over time, not just in subject, but also in style in order to reflect the exigencies that prompt them. As the form and function of the signing statement changed, the arguments presented in them changed as well to create a distinct form that mirrors the nature of the presidency during the War on Terror. Looking at different eras when signing statements were used gives a sense of how the signing statement reflected the particular understanding of the presidency of the person using it.

Early Signing Statements

It would be a mistake to treat signing statements as if they were a new part of the presidency. As early as the Monroe presidency, statements were issued on the passage of legislation by Congress to express the views of the president on that legislation. These early statements are less obviously controversial. Perhaps the earliest statement of this type was issued by President Monroe. In this instance the President was responding to a piece of legislation dealing with the reorganization of the military that had been unclear about what would be the pay and rank of officers appointed to new regiments. Monroe, believing that the lack of clarity in the law could be resolved without requiring a veto, expressed in a statement to the Senate his intention and reasoning in resolving the vagueness of the bill. Recognizing that he was on unclear constitutional ground in that his actions might be contrary to the intention of the Senate, he used the statement as a way to ask permission from the Senate to proceed. As he cautiously put it,

> These circumstances were considered as constituting an extraordinary case within the meaning of the section already referred to of the Regulations of the Army. It is, however, submitted to the Senate whether this is a case

> requiring their confirmation; and in case that such should be their opinion, it is submitted to them for their constitutional confirmation.[85]

Given the tentative nature of the statement in which Monroe explicitly acknowledges that the process for dealing with such an extraordinary case is unclear and that he is submitting his intentions to the Senate for approval, it appears that Monroe was inclined to ask permission rather than to beg forgiveness, indicating a sensitivity to the unsure constitutional ground on which he stood. In another message sent later that year Monroe addressed a concern raised in the Senate about the appointments Monroe had made. In his response Monroe attempted to outline his concerns more clearly and, significantly, he once again submitted his interpretation and appointments to the Senate for approval stating:

> Having omitted in the message to Congress at the commencement of the session to state the principles on which this law had been executed, and having imperfectly explained to them in the message to the Senate of the 17th of January last, I deem it particularly incumbent on me, as well from a motive of the respect to the Senate as to place my conduct in the duty imposed on me by that act in a clear point of view, to make this communication at this time.[86]

The decision to foreground the fallibility of the presidency in directing Congress lent a degree of comity to the request that posits the relationship as collaborative rather than argumentative. The role the President outlines for his office is to offer guidance on his intentions, rather than to direct the Senate to a particular action

This pair of statements, written with the clear intention to be tentative, deferential, and respectful to the powers invested in the legislative branch sounds like an amicable

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[85] Monroe, James "Special Message", January 17, 1822. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. http://www.presidency.ucsb.edu/ws/?pid=66281.

[86] Monroe, James "Special Message", April 6, 1822. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. http://www.presidency.ucsb.edu/ws/?pid=66303.

dialogue between partners in governance. Rather than merely submitting to the Senate, Monroe is committed to defending the position he has already taken, and persuading the Senate that it is the most desirable response to the legislation that has been passed. In some respects, this harkens back to the original concerns raised in the framing of the U.S. Constitution by other political figures such as James Madison, who argued that the office of the President could too easily become tyrannical and curtail the democratic and representative role served by the legislative branch.[87] As one of the last Presidents to have been politically active during the Revolutionary War, Monroe would have been more sensitive to those concerns than his predecessors. Reading this early prototype of what would become the signing statement in this light demonstrates how radically different later Presidents would view not only how signing statements could and should be used, but also what the role of the President is within the constitutional framework of the United States.

What we also see is one of the early characteristics that marks how signing statements function as a generic form. A signing statement is different from a public comment on a bill that has been passed. Rather than explaining the function and significance of the bill to the general public, this signing statement is dialogic in nature and seeks a response from the legislature. In this way, it responds to more nuanced, complex, and technically sophisticated concerns than would typically be accessible to a layperson. In this way, statements in general function as a technology of governance, rather than as a technology for governance in that they seek to inaugurate the conditions under which governance takes place, rather than do the work of governing.

It was not long before other Presidents attempted to test how far the approach taken by Monroe could expand the authority of the office. The first of these came eight years later under President Jackson. In this case, a bill that would have provided funding for a road between Chicago and Detroit could have been understood to provide funding and authorization for the road to stretch further east than Michigan. President Andrew Jackson, often remembered for his skeptical view of the federal government, wanted to make clear that his approval presumed that the road would not extend beyond either Detroit or Chicago. In one of the most impressive examples of a single remarkably long sentence influencing legislation Jackson stated, "I have approved and signed the bill entitled 'An act making appropriations for examinations and surveys, and also for certain works of internal improvement,' but as the phraseology of the section which appropriates the sum of $8,000 for the road from Detroit to Chicago may be construed to authorize the application of the appropriation for the continuance of the road beyond the limits of the Territory of Michigan, I desire to be understood as having approved this bill with the understanding that the road authorized by this section is not to be extended beyond the limits of the said Territory."[88] This phraseology itself is unclear, given that a road between Chicago and Michigan would of course leave the territory of Michigan. In context, what this meant is that funds appropriated for the road would be used to extend the road east of Michigan.

The tone in this statement is telling. Rather than seeking permission or authorization to proceed, as Monroe had, the Jackson signing statement appeared to be

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[88] Jackson, Andrew "Special Message," May 30, 1830. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. http://www.presidency.ucsb.edu/ws/?pid=66775

explaining how the President understood the provision for the purposes of enactment. Unlike the approach taken by Monroe which actively sought cooperation and agreement with the legislative branch, Jackson seemed to have a sense that he was only required to notify Congress of his interpretation. This approach, though perhaps less collaborative, at least signals an appreciation for the importance of divided powers and the need for the executive branch to have a relatively limited purview over policy concerns. Given the combative nature of Jackson as a President (and it is worth noting that this statement was issued during a particularly contentious period of Jackson's presidency that would ultimately result in the resignation of his Vice President), this response should be understood as a very measured and sensitive response by Jackson to prevailing sentiments regarding the Constitution.

Like the early statement issued by Monroe, this very short message was clearly not intended to respond to a universal audience. Rather it was a brief informative message sent to Congress as a part of the legislative rather than the deliberative process.[89] This early tendency toward a direct engagement with Congress helped shape the notion that the executive branch could engage with Congress directly in a formal manner, before the advent of a strategy built around "going public" or relying on the "bully pulpit" as a means to change policy through public pressure. Read this way, the origins of what we recognize as signing statements is a genre of speech intended to engage in an interbranch dialogue that acknowledges the primacy of Congress in policymaking and the absence of a role for the public in creating pressure for policy change. Put bluntly, what

[89] The distinction here between the legislative and deliberative processes simply refers to the distinction between the process by which a law is written and the process by which the goals and values embedded within a piece of legislation are developed.

distinguishes the early versions of what would become signing statements from the later iterations is the acknowledgement that in attempting to engage Congress in the legislative process, the President is ultimately subject to Congressional authority.

For scholars concerned with the way signing statements implicate democratic practice this is especially significant. The concept of interbranch dialogue precedes the development of presidential rhetoric as a means to persuade the public so that Congress will feel pressured to change policy. The signing statement in this way exists from the outset as a document that operates outside the democratic elements of presidential power. As mentioned in other places, the notion of a rhetorical presidency as described by Tulis was originally a constitutional dilemma because it gave the President the ability to influence Congressional deliberation in a manner that violated the independence principle that had been created to separate powers between branches (39-40). For those, especially rhetoricians, who have argued that presidential rhetoric and a strategy of going public represents a democratic dialogue with the population, the signing statement is an early move to exercise the power of the presidency that resists democracy.

The Dangerous Turn

After the early ventures by Monroe and Jackson a disconcerting turn was made. The exigency for this turn was not unsurprisingly a remarkable opportunity, perhaps unique in the post-Jefferson era, to dramatically expand the size of the United States. Of course, such an opportunity came with significant problems; not the least of which included an ongoing debate over how states ought to be represented. Following the Sixth census, and the addition of new states to the country the House of Representatives

reapportioned the number of representatives given to each state. As a part of this reapportionment the state governments were required to change the districts that they had used for representation to this point.

For President John Tyler this act posed a significant conundrum. Could the Federal Government compel the states to change their own laws for how their governments were elected? For John Tyler, a Southern Democrat with a firm belief in states' rights[90] this seemed like overreaching on the part of the House of Representatives, prompting him to write a statement which expressed some reluctance and skepticism over the constitutionality of a bill which outlined how Representatives would be apportioned between states. Although this power fell clearly to the Congress of the Federal Government, the bill attempted to outline the procedure by which the states would elect these Representatives, which arguably is a decision that should have been left to the states. President Tyler took it upon himself to express these reservations in a signing statement which, although acquiescing to the power of Congress to pass such legislation, also expressed reservations about the legitimacy of the legislation. In this statement John Tyler made two significant changes to earlier statements that helped frame how they would be used in the future.

First, this time the signing statement was not intended to promote dialogue with Congress. Rather, it is an expression of general concern directed at a more universal audience. As Tyler concluded:

> In approving the bill I flatter myself that a disposition will be perceived on my part to concede to the opinions of Congress in a matter which may

[90] One of the best examples of this belief is found in his decision to serve in the legislature of the Confederate States after serving as President of the United States.

> conduce to the good of the country and the stability of its institutions, upon which my own opinion is not clear and decided. But it seemed to me due to the respectability of opinion against the constitutionality of the bill, as well as to the real difficulties of the subject, which no one feels more sensibly than I do, that the reasons which have determined me should be left on record. (Para. 7)[91]

Notably, Tyler did not direct his comment to Congress, but to posterity. He did this first by referring to Congress as a subject of his statement, namely as the body to whose authority he was relenting. He also indicated that his concern was how he would be perceived generally in taking this action. In so doing, Tyler made a subtle shift away from the signing statement as a means to engage in a dialogue with Congress toward the signing statement as a way to explain the viewpoint of the executive branch to a universal audience.

This shift is important. Although the signing statements after Tyler retain certain characteristics of legal language, such as mentioning existing case law or referring to legal concepts, they also reflect a judgment addressed to the universal audience. As Perelman and Olbrechts-Tyteca explain, audiences have different kinds of evidence, values, and presumptions that filter what language and arguments are going to be effective.[92] In shifting from dialogic communication toward a more universal audience that would seek to use the text of the signing statement, Tyler also begins a shift in the genre toward a more authoritative and commanding style. This change in style is noteworthy, because it marks the shift from the signing statement as a tool to foster

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[91] Tyler, John. "Special Message," June 25, 1842. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. http://www.presidency.ucsb.edu/ws/?pid=67545.

[92] Perelman, Chaim. "The New Rhetoric." *The New Rhetoric of Chaim Perelman*, Ed. Ray Dearin (Lanham: United Press of America, 1989), 38-39.

interbranch relations to a tool used to expand and defend the supremacy of the executive branch.

As will be discussed later, one of the innovations in the use of the signing statement that began under the Reagan administration was to attempt to publicize the signing statement as a legal document that carried the force of law. Although the statements themselves do not mirror the language one might use to appeal to a universal audience because the language is legalistic and requires erudite understandings of legal precedent and legislative interpretation, the attempt to speak to an audience beyond Congress required the statement to take on the tone of a command or decree so that the statement will appear credible as law to a broader audience. What is lost in this shift is a degree of comity and deference to Congress that was a defining characteristic of early signing statements designed to create interbranch communication.

Second, the content of this statement raised a very different question for just how the President ought to function within the constitutional framework. Earlier statements had dealt with how the President ought to interpret vague parts of legislation to serve the intent of Congress. This signing statement was not concerned with a lack of internal clarity in the legislation, but rather with an external inconsistency that the law created with a popular school of constitutional thought. The shift in this signing statement to whether the intention of Congress was constitutionally legitimate would provide the blueprint for some of the more controversial uses of signing statements in years to come.

One of these more controversial uses occurred under President Polk.[93] Well known for his belief in manifest destiny, one of his more controversial actions concerned the creation of a government for a newly created state. When Oregon joined the Union it did so with a government that prohibited slavery. The bill passed by Congress confirming this state's membership in the Union created a potential political problem for Polk in that it complicated the existing Missouri Compromise which had been intended to insure that new states would enter the Union with an even division between states with and without slavery. Polk used the opportunity to sign this bill as a way to signal his position on the inclusion of further states in the union.

In his statement Polk argued for continuing the Missouri compromise, going so far as to say that his approval of the bill was granted only because he believed the bill affirmed the basic tenets of the compromise. Indeed, he argues against a potential barrier to the country following that compromise by arguing against local self-determination on slavery in favor of strictly geographical boundaries. In so doing Polk, perhaps inadvertently, demonstrated the end to which signing statements would later be used, to assert the power of the executive branch against the possibility of more local democratic mechanisms. Polk argued that a failure to rely on geographical boundaries insured that partisanship over the issue of slavery combined with democracy would create such high stakes for governance that violence would be inevitable and the country could be torn apart. In some ways, his statement could be read as prophetic given the violence that would break out shortly in the Kansas territory. Nonetheless, the anti-democratic

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[93] Polk, James K. "Special Message," August 14, 1848. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. http://www.presidency.ucsb.edu/ws/?pid=68034.

sentiment in this statement perhaps reveals that Presidents use of signing statements can short circuit the democratic process.

The telling rhetorical element in this statement is the emphasis on the need for national unity and common government. Polk quoted from George Washington's "Farewell Address" to appeal to the established belief that the people both desire and benefit from unified government. In so doing, Polk is making a subtle appeal to the supremacy of the Federal Government and more subtly, to the role of the executive branch in determining what satisfies the will of the people. This appeal to unity and national coherency reappears in later signing statements as the primary justification for the President to overrule the legislative processes of Congress and the role of the public in providing democratic accountability.

Signing Statements Reemerge

Signing Statements would continue to be a part of the presidency following the Polk administration, but typically would not play a significant role. It is important to note that the statements described above were not considered legally significant or binding. Most of them were in general deferential, and even where contentious acknowledged that the President ultimately was submitting to congressional authority. This is a major difference between the early signing statements and those frequently used under the Bush and Obama administrations. The later statements, although typically in keeping with significant views and appeals outlined above, made a disconcerting departure in that they asserted a role for the executive not just in voicing an opinion on legislation, but a role in reviewing and modifying that legislation.

During the Reagan administration the functions of signing statements began to change. Although signing statements by this point were recognized as a common part of the presidency, they frequently were contentious; the Reagan administration and, in particular the lawyers working for it, clearly saw the signing statement as a tool for more aggressive executive branch control over the legislative process. This effort began as Edwin Meese took over as the Attorney General and created what became known as the Litigation Strategy Working Group (LSWG). This group worked on a number of issues of concern for the president and the Department of Justice, but perhaps the most significant task for the LSWG was expanding the role of signing statements in how Presidents performed the office.

The makeup of this group is significant. Of course, it included the Attorney General Edwin Meese, but it also included a number of the Deputy and Assistant Attorney Generals who would later take on significant roles either under the George W. Bush administration or in the War on Terror. These include Supreme Court Justice Samuel Alito, Judge Jay Bybee who prior to his 9th Circuit Court of Appeals appointment wrote the "Torture Memos" while working as an Assistant Attorney General, Michael Carvin who would represent George W. Bush before the Supreme Court on the matter of the vote count in Florida, Federal 9th Circuit Court of Appeals Appointee Carolyn Kuhn (whose nomination was successfully filibustered), and Jay Stephens who was general counsel and Vice President of the defense contracting firm Raytheon Co. Other members of the working group who did not directly involve themselves in the George W. Bush

administration often worked as lawyers for conservative causes often as members of the Federalist Society.

It is tempting to read the membership of this group and the role its members played in conservative circles and the Bush administration in a conspiratorial manner. Doing so would not be entirely unjustified, but perhaps belies the larger problem that is pervasive in the documented record of the group's deliberations on the use of signing statements. In the archived memos preserved from the time the group deliberated on signing statements, the consistency within the group and how they viewed signing statements is indicative of a remarkably common and powerful shared ideology. In this case, the ideology is rooted in the notion that the executive branch should have (and in practice has in any case) a role in the legislative process. This point of view was of course not unique to the Reagan administration or this particular group. Signing statements by this point had become a prominent feature of presidents as a way for the president to express their beliefs and concerns on the legislation that had been passed. The innovation made by this particular working group was to push for the publication of these signing statements as part of the legislative record.

Previously, signing statements had almost always been delivered orally. The earliest versions outlined above were written, but typically delivered personally to Congress. Subsequently, they typically were oral statements delivered by the President in a public address after signing a bill. The conceptual shift made by the LSWG was to urge that these statements be published so they could be viewed as a contribution to the legislative record. As a part of the legislative record, the signing statement not only

would contribute to how the courts interpreted the law, but also could be used to modify the law for the purposes of enactment by Federal agencies.

Although the history of publication as a form of cultural mediation is more nuanced than can be precisely teased out here, there is an important insight to be gained from appreciating the importance of publication in public attachment to the law. In particular, the United States has a historic cultural attachment to publication in part because from the earliest days of the European settlement, the practice of writing charters and Constitutions has served as a means for people to define themselves as a population (13-14).[94] As Warner notes, "By constituting the government, the people's text literally constitutes the people. In the concrete form of these texts, the people decide the conditions of its own embodiment. The text itself becomes not only the Supreme law, but the original embodiment of the people (102)."[95] The decision to take on the task of publishing signing statements which engage in interpretation of the Constitution is an attempt to acquire this same source of authority. By publishing signing statements, the role of the executive branch shifted from executing the will of the people to creating a definition of the people's will.

The revolutionary nature of this shift is perhaps best described by LSWG member James Spears in his description of how signing statements were understood as a part of the legal system of the United States:

> With regard to the specific legal issue raised in your memorandum -- the use and weight of Presidential signing statements as aids to legislative interpretation -- we have been unable to find any caselaw, articles, or treatises which discuss this precise issue. Indeed, virtually the only

[94] Warner, Michael. *The Letters of the Republic* (Cambridge: Harvard University Press, 1990), 13-14.
[95] Warner, Michael. *The Letters of the Republic*, 102.

> reference to the use of statements made by the executive in approving legislation is found in Sands, Sutherland Statutory Construction, § 48.05 (4th Ed. 1973) (p. 1-2).[96]

The case referenced deals with a veto message from a state governor being included as a part of the legislative record. The memo argues that despite "little precedential support for this position" that "the state legislative process is clearly applicable to the Constitutional role of the President in the legislative process."

The crux of the argument made in the Spears memo is that there are two different approaches to interpreting legislation. The first approach, which focuses on the intent of the legislature, would largely exclude the role of signing statements, but the second approach, which focuses on the "meaning of the statute," according to Spears, offers a powerful role for signing statements. He argues:

> If a court adopts the "meaning of the statute" rather than the "intent of Congress" standard in interpreting ambiguous legislation, the relevance of a Presidential signing statement as an aid to legislative interpretation increases dramatically. The critical difference is that, unlike the subjective "congressional intent" standard, the "meaning of the statute" test focuses upon an objective analysis of what other [SIC] perceive it to mean – and that public perception would be influenced by the President's interpretation of the statute. As such, the court is really asking what a reasonable person would infer from reading the statute in question. In this context, the interpretation of legislation by the Chief Executive in a signing statement would be clearly relevant and significant in assessing the objective meaning of the statute, since it represents the first opportunity for construction of the legislation outside the walls of Congress. While it does not appear that one could rely on the interpretation contained in the signing statement to the exclusion of other forms of intrinsic and extrinsic aids to construction, a strong case can be

[96] US. Department of Justice. Presidential Signing Statements. Assistant Attorney General James Spears National Archives. 25 Oct. 1985. 15 July 2016 <https://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box3-SG-ChronologicalFile.pdf>.

> made that is should certainly play an important role in the interpretation process (p. 6).[97]

Spears writing is in line with what would later come to be called "originalism," popularly associated with Justice Scalia, who sought to shift the view of the court from "subjective" interpretation of intent to an "objective" reading of the law which, in a bizarre twist, can best be determined by how the President has persuaded others to think about the law. At the foreground of this argument is the recognition of, and attempt to empower, the persuasive power of the office of the President.

Spears concludes the memo by providing a playbook for how to increase the power and public visibility of signing statements. The first step was to convince Dwight Opperman, the President and Chief Executive Officer of West Publishing Company, to include signing statements as a part of their publication "United States Code Congressional and Administrative News" (USCCAN) which included the legislative record used by Congress. The next step was for the DOJ to begin promoting the use of signing statements and to refer to them "whenever possible". The last step was to begin publishing scholarly articles about signing statements in public forums both to lend credibility to the practice and encourage attorneys in private practice to make greater use of them. In short, the DOJ would do the work to establish the signing statement as a core part of the presidency.

Opperman agreed to publish the statements and even expressed surprise that no one had thought of it before. Members of the LSWG would go on to publish a number of

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[97] US. Department of Justice. Presidential Signing Statements. Assistant Attorney General James Spears National Archives. 25 Oct. 1985. 15 July 2016 <https://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box3-SG-ChronologicalFile.pdf>.

articles in public and academic forums that defended the use of signing statements. The LSWG would continue working to develop a formal understanding of the signing statement and how it could be used to expand the power of the president. This developed through a series of memos exchanged between different members of the LSWG that demonstrate the commitment held by the group to the use of signing statements as a means of changing the legal system.

One straightforward example of this is in a memo between members of the group revising a briefing on a policy within the DOJ on "attorney's fees" as the result of congressional legislation. Given that it is an intra-departmental memo about an internal policy, a statement by the President would seem to be overkill for justifying how a policy within the department, rather than the law proper, is understood. Yet in this memo LSWG member Ralph Tarr advised a revision to the briefing because it does not include a sufficient discussion of a signing statement issued by President Reagan.[98] This demonstrated that the LSWG was not only looking to raise the profile of signing statements by legitimizing them, but also was actively trying to incorporate them into how the DOJ responded to day-to-day affairs.

These memos culminated in the most thorough explication of the LSWG's position on signing statements by Supreme Court Justice Samuel Alito who was nominated to that position by George W. Bush. In his memo Alito made several claims that would influence the George W. Bush administration's use of signing statements. The first of these was recognizing major problems that would need to be resolved by the

[98] U.S. Department of Justice. Equal Access to Justice Act Policy Guide Acting Assistant Attorney General Ralph Tarr National Archives. 25 Oct. 1985. 15 July 2016 <https://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box3-SG-ChronologicalFile.pdf>.

executive branch in order to make signing statements a recognized and effective approach for the executive branch to assert a role in enacting policy.

The first problem was that there was no precedent for the use of signing statements. By the time that Alito wrote the memo, the LSWG was already working with the assumption that the executive branch did in fact have a role in the legislative process. As he put it, "Our primary objective is to ensure that Presidential signing statements assume their rightful place in the interpretation of legislation. In the past, Presidents have issued signing statements when presented with bills raising constitutional problems. OLC has played a role in this process, and the present proposal would not substantively alter that process (1)."[99] This introduction to the memo indicates that the group perceives the president as having a "rightful" place in the interpretation of legislation, which is a significant assumption because it allows the LSWG to avoid the more troubling question of whether the president should have such a role. Moreover, this introduction would insinuate that the LSWG is not making any substantive change to the current configuration of government, but rather is attempting to create support and legitimacy for an unrecognized status quo.

An argument might be raised that this explanation of the purpose of the LSWG does not seem to be inherently rhetorical in that it merely deals with the proper understanding of an already existing practice. The way Alito uses the term "interpretation" in the introduction undermines such a reading. Alito continued:

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[99] U.S. Department of Justice. Using Presidential Signing Statement to Make Fuller Use of the President's Constitutionally Assigned Role in the Process of Enacting Law. Deputy Assistant Attorney General Samuel Alito National Archives. 25 Oct. 1985. 15 July 2016 <https://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box6-SG-LSWG-AlitotoLSWG-Feb1986.pdf>.

> Presidents, unlike Congress do not customarily comment on their understanding of bills. Congress churns out great masses of legislative history bearing on its intent—committee reports, floor debates, hearings. Presidents have traditionally created nothing comparable. Presidents have seldom explained in any depth or detail how they interpreted the bills they have signed. Presidential approval is usually accompanied by a statement that is often little more than a press release (2).[100]

In Alito's view interpretation means more than simply expressing an opinion. It means asserting a role for the President that had typically been reserved for Congress. If it were merely a question of the President offering an interpretation to frame a piece of legislation for the public that would be innocuous enough as it would not purport to have the force of law. Yet in Alito's view, that interpretation has the ability to supersede the body of interpretive texts produced by Congress as a part of the legislative process. Toward that end, the LSWG attempted to reconceptualize the role of presidential interpretations of legislation as an attempt to use the previously acknowledged rhetorical privilege of the presidency to speak on legislation as a means to assert a legal power of interpretation.

This approach is demonstrative of remarkably insular and myopic thinking on the part of the LSWG. Alito's memo was the last to discuss the preliminary questions of how presidents could turn the signing statement into a legally forceful document. The subsequent memos on the topic only mention the need, as the Tarr memo did, for signing statements to feature more prominently in briefs provided by the DOJ. Rather than asking the question of whether the practice of signing statements as a way to influence law was a legitimate practice, all of the contributors proceeded with the presumption that

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[100] U.S. Department of Justice. Using Presidential Signing Statement to Make Fuller Use of the President's Constitutionally Assigned Role in the Process of Enacting Law. Deputy Assistant Attorney General Samuel Alito National Archives. 25 Oct. 1985. 15 July 2016 <https://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box6-SG-LSWG-AlitotoLSWG-Feb1986.pdf>.

they already were and merely needed to be better publicized. From the outset, there was no critical opposition to the use of signing statements within the executive branch, and by the time commentators on the executive branch had cause to be critical of the use of signing statements their use had already become common.

Alito proceeds to outline the most significant problems facing the use of signing statements. One of the greatest problems is the lack of institutional support for the use of signing statements. In particular, the time constraints for producing one are perhaps too limited for widespread use, especially with labor constraints that independently make it difficult to produce rigorous and substantive signing statements. These concerns will be magnified if signing statements do catch on given the demand by other federal agencies to have input on signing statements in the same manner that the DOJ has historically. The other two problems raised are of equal significance. The first is that resistance from Congress is likely to be quite strong and could render signing statements untenable unless an aggressive defense of them were provided. The second is that there are a myriad of theoretical problems that must be resolved in order for them to work in the way the LSWG presumes they should. Perhaps most pointedly, what happens when the will of the President and the will of Congress contradict each other?

The proposal Alito made in response to these problems of course resolves none of them. In fact, the proposal itself was limited to a pilot program in which the LSWG would have to persuade the president to participate, which makes clear the disconnect between the office of the President and the executive branch, defined broadly as including federal agencies. In the instance of these signing statements, the proverbial tail

wagged the dog. The DOJ worked to convince the President to fundamentally change the nature of the office by expanding the executive branch so that the DOJ would be included.

In this context, signing statements not only are a continuation of a practice that has gained more public notoriety; but also have evolved from an oratorical practice to become a constitutional function of the presidency. This function was not anticipated either by the framers of the Constitution or early practitioners of signing statements and clearly has greater significance than was previously recognized. Viewed in this light what becomes clear is that the DOJ under the Reagan administration was unaware of the extent to which they were changing the constitutional structure of the United States and deliberately avoided the questions of whether or not such a change was desirable or within their power. The deleterious consequences of this remarkable oversight would not be properly appreciated until the George W. Bush administration pushed this reconceived presidency to its logical extreme.

As they were understood by the LSWG, signing statements were conceived as a thoroughly rhetorical tool to expand the power of the office beyond simple persuasion. They perform a rhetorical reading of legislation to provide an interpretation. They do the rhetorical work of persuading the audience(s) to view legislation in the same manner as the executive branch. They rely on the executive branch as having laid the rhetorical groundwork for them to be viewed as important by the other branches of government and the broader public. When signing statements changed from a relatively innocuous and

deferential practice to become a more substantive part of the presidency, they were understood as a rhetorical practice.

Taking Power

The George W. Bush presidency represented what can only be described as a unique opportunity to bring into effect many of the changes outlined in the Reagan administration not just in terms of how signing statements were used, but also in terms of how the presidency was conceived. Under the Bush administration many of the personnel who worked in the Reagan administration were given the opportunity to test and expand the notion of the unitary executive with immense consequences.

The nature of decision making around presidential appointments makes it unsurprising that George W. Bush brought a large number of Reagan era employees into the executive branch. Some of the people responsible for this move were part of the LSWG. Others were not part of the LSWG, but they readily adopted the notion that the presidency ought to take advantage of them in order to counter actions taken by Congress to limit the power of the executive branch.

The structure of the George W. Bush administration contributed in significant ways to the expansionist tendencies of the executive branch. In part this was the result of a fairly standard logic in how appointees are named. The selection of appointees for political reasons tends to exclude from consideration those appointees whose greatest interest is in preserving the office rather than in preserving the interests of the party who occupies the office. An even greater influence was the power given to individual actors with little oversight both inside and outside of the executive branch.

As Walcott and Hult argue, the early days of the George W. Bush administration seemed to apply hard earned lessons from the Clinton administration (29-30).[101] Foremost among these was a rigid hierarchical cabinet structure that was intended to resolve much of the confusion that resulted from the ad hoc approach taken early in the Clinton presidency. The nature of the appointments by Bush made this hierarchical structure particularly potent, because those appointed to higher positions were by and large appointed based on their loyalty. Inevitably a group with strongly shared loyalty also tends to have shared ideals and lacks diversity in thinking. It comes as no surprise that when some members of such a cabinet have such a strong commitment to a particular line of thought, those members would be able to wield a disproportionately large level of influence on both the cabinet and the policies it pursues.

A significant distinction can be drawn here between the policies that are created and the means by which those policies are enacted. Although any of the policy positions pushed for by the Bush administration were united under the broad banner of conservativism, there was an even more unified view of how the process for policy creation ought to proceed that brought the role of signing statements to the fore.

Given the institutional inclination of the George W. Bush administration, one might assume that the use of signing statements was a particular trait of Republican presidential administrations. This would be a mistake. President Clinton had also used them extensively, although in a less aggressive manner. In itself this is not much of a surprise. Following the development of the signing statement as a concept under the

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[101] Walcott, C.E. & Hult, K.M. "The Bush Staff and the Cabinet System" *Testing the Limits: George W. Bush and the Imperial Presidency*, Ed. Rozell, M.J. & Whitney, G., (Lanham: Rowman & Littlefield Publishers Inc., 2009) 29-30.

Reagan administration and its limited use under George H.W. Bush, it makes sense that Clinton would also feel comfortable using them. The problem is that Presidents generally adopt and expand the lessons learned from their predecessors. In Clinton's case this meant making extensive use of signing statements as a way to express the official opinion of the presidency on legislation, but the majority of signing statements were limited to expressing an opinion rather than attempting to forestall the enactment of a law.

One reason for the more limited role given to signing statements by President Clinton was the availability of an alternative that served a similar function. Campbell and Jamieson in their study of signing statements view them as a line item veto that is used to strike down or modify specific parts of a bill. For Bill Clinton the use of signing statements in this particular manner would be in some ways redundant, at least conceptually, with the actual ability to use the line-item veto which Clinton had for a brief period. Even before and after the line-item veto was struck down as unconstitutional, its existence as a theoretical possibility made it incongruous or contradictory to consider signing statements as an option that served the same purpose. So although Clinton used signing statements frequently, he was less aggressive in what he hoped to accomplish with each signing statement.

By contrast, George W. Bush was far more aggressive in what he hoped to accomplish. While maintaining the impressive signing statement output of the Clinton administration, the Bush administration used signing statements in a more direct manner than simply expressing the views of the presidency. The Bush administration applied the

conceptual development of the DOJ under the Reagan administration to redefine the signing statement as a way to modify legislation.

The Bush Turn in Signing Statements

Signing Statements featured prominently as a tool for the executive branch during the terror wars. As noted above, the George W. Bush administration was particularly well situated both in terms of how the executive branch had been institutionally organized by previous administrations, as well as by the George W. Bush appointments to take advantage of the situational demands created by the terror wars. The signing statement, with its simultaneous commitment to serving a rhetorical function while enacting change in policy, emerged alongside a foreign policy problem that would tempt the president to take advantage of such a suspect practice.

Understanding the terror wars as a rhetorical situation helps elucidate why the signing statement represents an intervention in the legislative system that takes advantage of a given context to transcend the limits of that system. Signing statements are not only problematic because they change legislation, but also because they are able to operate outside the limits of legislation. Because of the generic form given to signing statements, which retain the characteristics of public address, they are expected to include the same declarations of beliefs, values, and goals of the executive branch that are expected in a public address. Because of the work done to legitimate the signing statement as a part of the legal system, the contemporary signing statement has also become a vehicle to enact those beliefs, value, and goals into law.

This approach began early in the George W. Bush administration. A handful of signing statements were passed before the attacks on September 11, 2001, and in general they did not make any change to the legislation, but took the opportunity to thank Congress and express a hope for continued bipartisanship. Admittedly innocuous, this signing statement fits within the precedents set for the use of signing statements by previous administrations and does not attempt any sort of an intervention into law.

The first signing statement issued after the September 11 attack was issued on September 18 in response to the "Authorization for the Use of Military Force" popularly termed as the "Authorization for the Use of Military Force Against Terrorists." This authorization gave the President the authority to use force against those persons responsible for attacks against the United States and was issued to satisfy the requirements of the War Powers Resolution, specifically the requirement in Section 5B of the resolution that Congress must give authorization for the use of force to extend beyond 60 days of unilateral action by the President. The Authorization was not a formal declaration of war, nor was it an authorization for the use of force against any and all threats. It was limited only to those persons, organizations, or countries that were implicated in the attack.

In response to this authorization, President Bush issued a signing statement that expressed the shared concerns of the executive and legislative branches and thanked Congress for quick bipartisan action. Again, the statement appears innocuous. The primary impression that the statement attempts to impart is a sense of unity in the face of an ongoing terrorist threat. As the statement says, "Our whole Nation is unalterably

committed to a direct, forceful, and comprehensive response to these terrorist attacks and the scourge of terrorism directed against the United States and its interests (Para. 5)."[102] The use of the phrase "Our whole nation" effectively signals to the audience that the President considers himself and Congress to be one with the rest of the country. The word "our" of course signals that the President considers himself and the Congress to be owners in kind with the citizens of the United States. "Whole" means without exception across the population of the country. "Nation" is the geographically incorrect term that works rhetorically to bind people into one group in a manner that "country" might not because a "nation" is made up of one people with social, ethnic, religious, etc. homogeny, but a country implies a political binding of a heterogeneous population. There is little doubt that the aim of the President was to reinforce the notion of a nation that is unified in resistance to terrorism.

In context this makes sense; the nation had just experienced the largest domestic terrorist attack in contemporary history. Clearly some response had to be made, and the President had to take steps to prepare the country for it. A signing statement using strong language made sense. Referring to terrorism as a "scourge," attacks against "innocent Americans" as "treacherous and horrific acts of violence," make perfect sense. Thanking Congress for unity of purpose in keeping with the shared feelings of the public and the presidency fit.

But one sentence should give pause. It states, "In signing this resolution, I maintain the longstanding position of the executive branch regarding the President's

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[102] Bush, George W., "Statement on Signing the Authorization for Use of Military Force," September 18, 2001. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. http://www.presidency.ucsb.edu/ws/?pid=64595.

constitutional authority to use force, including the Armed Forces of the United States and regarding the constitutionality of the War Powers Resolution (Para. 4)."[103] This sentence foreshadows the function that signing statements would serve in the years to come. Arguing that the President had a distinct constitutional authority to use force without constraint from Congress became a hallmark of the language used in signing statements.

Which is not entirely untrue. The War Powers Resolution acknowledges the ability of the President to unilaterally deploy the military for very limited engagements, defined in the resolution as shorter than 60 days. Given this widely acknowledged reality, the addition of this particular sentence appears redundant unless the author is considering the possibility that there is a need to assert a presidential authority that overrides the War Powers Resolution. In this instance, such authority is explained as an unnamed "longstanding position of the executive branch." This claim is not explained in this signing statement, and just where this position has been explained or could be referenced is not indicated.

The decision to leave this sentence open-ended makes sense within the context of the signing statement. At the time that the Authorization was given and the signing statement issued, it was unclear against whom the U.S. military might be using force and for what period of time. In this context, more specific language that would limit the scope of future military action in terms of location, duration, or objective was undesirable because it reduced the flexibility of the authorization. Moreover, providing a more robust explanation and defense of the ability of the president to unilaterally wage war would

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[103] Bush, George W., "Statement on Signing the Authorization for Use of Military Force," September 18, 2001. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. http://www.presidency.ucsb.edu/ws/?pid=64595.

have appeared suspiciously combative in this context. Finally, even if the author had wanted to offer such a defense, putting one together in a timely manner might have been difficult, as Alito foresaw.

This short sentence was intended to be a placeholder. Although it did not provide the reasoning, it was intended to signify that if necessary an argument could be made. By asserting that such a long-standing position existed, the author of the signing statement left open the possibility for future explanation without foreclosing any options. The statement seemed innocuous, but retained the flexibility to be used as a way to expand the ability of the President to pursue military conflict.

Taking this signing statement as the origins of a genre shift, three major lines of argument can be identified that persist in the signing statements. The first is a conciliatory overture to Congress. The President thanks Congress for the passage of the bill and states his general agreement with the position taken by Congress. The second asserts (with varying degrees of reasoned support) the authority of the executive branch to have final say over the policy which has been passed by Congress. The third is a judgment on the legislation and how the president intends to enact it. These elements are significant features in the other signing statements used to pursue the terror wars.

Subsequently signing statements were frequently used by the Bush administration in two different ways in the terror wars. The first, and generally less acknowledged, signing statements responded to actions taken by Congress to indirectly assist in the terror wars, such as creating embargoes and providing supplemental appropriations. Other signing statements responded to attempts by Congress to modify existing U.S.

policy in the terror wars through the authorizations of military force, changes to the national security infrastructure, and most controversially, attempting to compel the President to change policies regarding indefinite detention and enhanced interrogation.

Although these signing statements had the same generic form and function, they were very different both in content and in the justifications they offered. To treat them as identical would mask important nuances that demonstrate the incongruity between the original uses of and justifications for signing statements and the diverse ends they were put to by the George W. Bush administration. Treating these statements differently does not detract from the claims made above about the generic nature of signing statements; instead, it shows how signing statements as a genre became more diverse in order to provide particular tools for particular tasks.

Going It Alone

The George W. Bush administration from the outset continued the trend among presidents of asserting the primary power of their office on foreign affairs relative to other parts of the government. Although this trend was not new, the aggressiveness of the George W. Bush administration in doing so was remarkable and especially apparent in signing statements. Understanding the reason for this shift requires recognizing that the President, his advisors, and cabinet members viewed the September 11 attacks as a fundamental change in the state of affairs facing the United States that was not only a major challenge, but also an opportunity to expand the power of the office of the President.

This process began by extending and expanding the existing constitutional presumption that the President should take the lead on foreign affairs. This is not a new position, and is generally accepted as a true proposition. Disagreement arises over the question of how much and in what ways Congress should have oversight over how the President conducts foreign affairs. The George W. Bush administration asserted that congressional oversight power was limited to what the administration permitted Congress to oversee.

In oversight questions one particularly contentious area is foreign intelligence gathering. Lingering fears of an overreaching surveillance state have been validated time and again in the history of the FBI, CIA, and NSA, prompting Congress to be particularly concerned about retaining oversight to prevent an overreaching executive branch. By contrast, presidents have sought to exercise control over how oversight is done, and what they are compelled to disclose, if not because they have something to hide, then because they perceive that at some future time they may need to hide something. In this spirit, on December 28, 2001, the "Intelligence Authorization Act for Fiscal Year 2002" was signed by President G.W. Bush with a signing statement attached.

The provision in question dealt with a requirement for the President to disclose to Congress, in writing, reports that were already required under the National Security Act of 1947. Historically, these reports were given orally to a select committee ostensibly to avoid the production of documents which could disclose significant sensitive information. The signing statement alleged that this provision "falls short of the standards of comity and flexibility that should govern the relationship between the

executive and legislative branches on sensitive intelligence matters and, in some circumstances, would fall short of constitutional standards (Para. 1)."[104]

The position outlined here by the President treats the requirement for a written report as an assault on "comity and flexibility," which characterizes the action taken by Congress as aggression against an unspoken agreement that governs the relationship between the branches. That the provision does not change the relationship as it only changes the medium by which information is exchanged, makes clear that the President is not preoccupied with the question of whether or not information must be conveyed. Rather, the problem is the presumption that Congress should be able to require the executive branch to convey the information in a particular way because it interferes with the ability of the executive branch to be flexible in terms of how information is conveyed.

Put another way, the President doth protest too much. The claim that this provision is in some circumstances "short of constitutional standards" is unsubstantiated in the statement, but is included to satisfy the generic constraint that the Constitution must feature as a reason to reject a provision. What unites this unsubstantiated claim about the constitutionality of the provision with the reason for its rejection is a more aggressive claim about the Constitution that the signing statement does not want to hazard to state plainly, namely, that the Unitary Executive Theory (UET) to which the administration ascribes holds that only the President can make determinations about how and when Congress should be informed of presidential decisions. Under UET, the Constitution gives the President broad authority to act without an obligation to submit to

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[104] George W. Bush: "Statement on Signing the Intelligence Authorization Act for Fiscal Year 2002," December 28, 2001.Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. http://www.presidency.ucsb.edu/ws/?pid=73481.

oversight, because oversight interferes with the authority to act. In this lens, all oversight is illegitimate to the extent that it could in any way interfere with the ability of the executive to act.

Reading this very short signing statement illuminates the function of signing statements. It offers the President the ability to limit the reach of Congressional action by undertaking a rhetorically complex explanation that simultaneously works to persuade the audience that the action taken by Congress is illegitimate while obscuring the basis for that claim. The traditional part played by the signing statement as an address to Congress rather than as a legal document changing legislation allows for the rhetorical tools of oratory to be repurposed to serve autocratic rather than democratic ends.

The use of the term "autocratic" here may seem unnecessarily provocative. Such a reading would perhaps be justified if later statements did not go further than simply treating oversight as unnecessary. A later statement attached to the "Foreign Relations Authorization Act of 2003" went farther. This particular bill, which is annually passed to authorize programs and spending for the improvement of U.S. foreign relations, included some provisions that outlined specific goals and offered guidance for the United States overseas. For example, one of the goals was achieving a seat on the United Nations Commission for Human Rights.

The response from the G.W. Bush administration was to sign the bill while attaching a signing statement that asserted: "The Act contains a number of provisions that impermissibly interfere with the constitutional functions of the presidency in foreign affairs, including provisions that purport to establish foreign policy that are of significant

concern (para. 1)."[105] There are some provisions that perhaps burden the executive. The provisions directing the executive branch to push for the United States to gain a seat on the United Nations Committee for Human Rights and to obstruct from membership on the committee other nations with significant human rights violations could prove burdensome. By contrast, another objectionable provision would have directed the Secretary of State to "Direct the United States representative to the International Atomic Energy Agency to oppose programs of the Agency that are determined by the Secretary under the review conducted under subsection (a)(1) to be inconsistent with nuclear nonproliferation and safety goals of the United States (para. 2)."[106] Reading this provision gives the impression that it simply affirms what one would hope the Secretary of State already does, namely oppose programs that are inconsistent with nonproliferation. Yet the signing statement objected to this provision as overly burdensome because although it affirmed the shared goals of the legislative and executive branches, it limited the flexibility of the executive branch by removing the ability to make a decision on a particular action.

The way the executive branch claimed it would deal with these provisions demonstrates the remarkably territorial and defensive uses of signing statements. The signing statement asserted:

> The executive branch shall construe as advisory the provisions of the Act, including sections 408, 616, 621, 633, and 1343(b), that purport to direct

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[105] Bush, George W., "Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003," September 30, 2002. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. http://www.presidency.ucsb.edu/ws/?pid=63928.

[106] Bush, George W., "Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003," September 30, 2002. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. http://www.presidency.ucsb.edu/ws/?pid=63928.

> or burden the conduct of negotiations by the executive branch with foreign governments, international organizations, or other entities abroad or which purport to direct executive branch officials to use the U.S. voice and vote in international organizations to achieve specified foreign policy objectives. Such provisions, if construed as mandatory rather than advisory, would impermissibly interfere with the President's constitutional authorities to conduct the Nation's foreign affairs, participate in international negotiations, and supervise the unitary executive branch (Para. 2).[107]

By construing these provisions as advisory, the President asserted that there was only an advisory role for Congress in formulating policy, rather than a role in supervising and taking action to influence policy. If the constitutional claim made in the signing statement is facially valid, Congress had overstepped its bounds; this signing statement was merely a notification of such an over step. Such a reading misses the way the signing statement positions the two branches. Congress not only lacks a role in foreign policy, but even the ability to engage in oversight because, as the statement later claims, it could interfere with the deliberative processes of the executive. Following the interpretation put forward by the Bush administration, Congress lacks the ability to take any legislative action without violating the Constitution.

This signing statement is also one of the first documents to assert that an action by Congress violates the principles of the Unitary Executive. As has been discussed in previous chapters, the unitary executive was not a new creation of the G.W. Bush presidency and had been a feature of the early memos that outlined the proposal for expanding the significance of signing statements. The shift to a more overt deployment

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[107] Bush, George W., "Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003," September 30, 2002. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. http://www.presidency.ucsb.edu/ws/?pid=63928.

of the concept is significant, in that it aims to incorporate the language of the theory into how signing statements are used. This is an attempt to shift the genre into a more authoritative document that can be used directly to counter attempts by Congress to rein in the presidency.

This generic shift is significant. One of the defining features of signing statements up to this point was a certain deferential attitude to Congress. Even when deferential attitudes are lacking, there is an expectation of a certain amicability towards Congress expressed in conciliatory language thanking Congress for support in the administration's efforts in putting the country on a wartime footing. In this signing statement a different, more combative approach is adopted that becomes more common in later signing statements. This combativeness indicates a trend toward a decreased reliance on Congress and, indeed, a tendency toward a presumption of presidential prerogative that must be defended against congressional challenges.

The preoccupation with the Unitary Executive is a major feature across signing statements from this point in 2002 onwards, finding perhaps its most judicious application in a signing statement attached to the "Homeland Security Act of 2002". This act was remarkable because it was created specifically in response to the attacks on Sept. 11, 2001, and the ensuing War on Terror that revealed shortcomings in the parts of the national security establishment responsible for the domestic protection of citizens. The Homeland Security Act was a far reaching piece of legislation that sought to reform the security system of the United States by creating a new Department of Homeland Security (DHS) that had the dual responsibility of addressing problems stemming from illegal

immigration and developing the means to prevent and respond to terrorist attacks taking place on U.S. soil. The second part of this mandate, dealing with the possibility of terrorist attacks within the United States, was the particular exigency for the creation of a new organization with a broader array of functions including customs and immigration enforcement.

Setting aside the implication of including border and customs enforcement in the department responsible for responding to and preventing terrorist attacks on U.S. soil, the creation of this new agency was significant because it fundamentally restructured 22 different executive branch agencies. In doing so, the DHS became a new centralized node for power in the executive branch that could directly affect major areas of U.S. foreign and domestic policy without the ability of Congress or the Courts to rapidly respond to presidential action.

One could contend that the DHS played a relatively small role in the way the United States pursued the terror wars. Such a claim ignores the role of domestic surveillance, immigration control, and border security in the terror wars and the diverse security goals that those potential problems were retooled to address. Of importance, it ignores the specific way that the President conceived of the DHS. For the G. W. Bush administration, the DHS presented a remarkable opportunity not only to consolidate control over the security and surveillance systems of the United States, but also to consolidate the primacy of the office of the President over Congress not only on national security, but on policy issues generally.

The Homeland Security Act of 2002 presented the executive branch with a rare opportunity in two ways. First, rather than modifying an existing agency or policy, the Homeland Security Act was original, lacking much of the refinement of an annual bill because of the speed with which the bill was passed in response to the exigency created by the September 11 attacks. Second, the creation of a new agency under the executive branch created the conditions necessary for the office of the President to advance an articulation of how the agency could be linked to other executive agencies ought to relate to the office of the President. This new department, because it had no institutional history of fraught relations with the executive branch, could from its origin be incorporated into UET in a manner that empowered the executive branch to control policy.

The signing statement issued by President G.W. Bush was significant in that it stated that the DHS was an agency through which the administration would exert a significant degree of direct control over.[108] A simple way to appreciate the scale of direct control is that the signing statement outlines over 30 provisions over whose implementation the President would exercise direct control, which makes this one of the more expansive signing statements ever written. Considering the scale of the authority asserted in the statement, one section requires Congress to amend parts of the bill during the next session to accommodate a Supreme Court finding that the administration preferred.

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[108] Bush, George W., "Statement on Signing the Homeland Security Act of 2002," November 25, 2002. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. http://www.presidency.ucsb.edu/ws/?pid=64224.

Of particular interest rhetorically is that this particular signing statement marked a shift from retaining many of the oratorical elements of the signing statement. This signing statement offered only a two sentence introduction without the usual language thanking Congress or framing how the office of the President understood the legislation as a whole. Moreover, the statement did not have a proper conclusion. In form, it is a list of provisions to which the President objects and an explanation of why, in light of that objection, the provision would not be implemented as Congress intended. This change in form may seem inconsequential, but is significant when positioned alongside the push made under the Reagan administration.

From the outset, the DOJ lawyers under the Reagan administration did not value the signing statement as an opportunity for the President to express a viewpoint on legislation. Their real interest was in the signing statement as a legally binding document that could be used to counteract congressional action. The signing statement attached to the Homeland Security Act of 2002 is representative of the shift in form and function envisioned by the Reagan Administration lawyers. Rather than reading as a form of public address, this signing statement reads like a piece of legislation. Most of the particulars in this signing statement deal with the minutiae of the bill, including the processes for funding, appointments, and the role of some agencies such as the Federal Emergency Management Agency. Read as a speech this statement is almost unintelligible given the way it is written. There is a distinct lack of explanation and the references in the statement would be impossible to follow in real time absent a copy of

the U.S. Constitution, U.S. Code, and the text of another half dozen different acts of Congress including the Posse Comitatus Act of 1886.

This shift from an oral address expressing opinion on legislation or engaging in a dialogue with Congress is significant because it undermines the traditional rhetorical function of signing statements in favor of a new rhetorical function of issuing commands. This shift has been identified and explained by a number of scholars concerned with the possibilities offered by signing statements. Notably, in the study of presidential rhetoric this shift has prompted some scholars to argue that the presidency has become post-rhetorical.[109] This turn in scholarship towards argument about a "post-rhetorical" presidency demonstrates a paradigm shift in academic appreciation of the presidency.

The claim that the presidency has become "post-rhetorical" is addressed in other parts of this project, but merits a more specific treatment here. The claim that the presidency is "post-rhetorical" is rooted in the notion that the presidency no longer operates through public persuasion, but rather through the strategic deployment of personal power held by the President. Such a claim may be misleading, because it would appear to posit that rhetoric no longer plays a role in the functioning of a presidency. This view derives from a limited view of rhetoric that ignores that even a decree or a command is a rhetorical act that uses language to deploy power rather than as a way to persuade others to use the power available to them. A broader view of rhetoric allows for a more precise understanding of how the President uses rhetoric both to deploy power

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[109] Mercieca and Vaughn, "The Post-Rhetorical Legacy of George W. Bush," *Perspectives on the Legacy of George W. Bush*, 31-52.

and to foster the expansion of personal power not only through public persuasion, but through decree.

Specifically, when a signing statement is made in a manner that is designed to eliminate what might otherwise be described as excessive rhetorical flourishes, it cannot free itself from the rhetorical functions of the language used. When one argues that the presidency is "post-rhetorical," the presumption is that because the signing statement is no longer serving the public function of dialogue with Congress or public proclamation of a presidential position, it no longer serves a rhetorical function. This signing statement is indicative of the decision by President George W. Bush to focus his rhetorical efforts on a different audience, making the claim that his presidency aspired to be "post-rhetorical" plausible only when rhetoric is understood in a supremely narrow sense.

This signing statement illustrates a rhetorical shift from persuading an audience to commanding an audience. This shift is significant because the effective use of a command rhetoric relies on a different relationship between the author and the audience. In a persuasive relationship, the power to act resides in the audience, and the speaker seeks to prompt the audience to action. In a command relationship, the power to act resides in the author, who compels the audience to act in response to that power. Here, the emphasis is on the power and position of the presidency to take action unilaterally while the congressional branch that is prompted to support that action demonstrates a command rhetoric.

Put differently, the claim that a presidency is "post-rhetorical" ignores the rhetorical character of presidential speech inferred here. It privileges the legalistic

approach to constitutionalism embedded in UET by emphasizing the formalized power of the office of the President, which may well have been constructed, but is nonetheless increasingly commonly accepted. A more insightful approach to the rhetorical presidency acknowledges that even the command has a rhetorical character which is susceptible to critique and fallibility. Reading the actions of the Bush administration as a shift within the framework of the rhetorical presidency, rather than a move beyond it to highlights the specific ways in which the language used reinforces the ideological and constitutional views of the President rather than focusing on the legal or constitutional validity of the signing statement.

Signing statements generated during the first term of the G.W. Bush administration laid a significant groundwork for how signing statements could be used to limit congressional oversight of the War on Terror. Two features of this discourse merit special attention. First, when attempting to limit oversight, the arguments in the early signing statements had less to do with the particular circumstances created by the War on Terror, than with the more general argument based in UET that the Constitution granted the President expansive power to act unilaterally without significant oversight or input on foreign policy by Congress. The statements tended to emphasize a constitutional objection that would remain regardless of the particular exigence provided by September 11, not that the exigence was irrelevant, but that the exigence did not determine the approach taken by the office of the President. Second, the signing statements were used in a manner that highlighted areas of agreement rather than areas of disagreement to give the appearance of comity while undermining the power of Congress in navigating the

foreign policy concerns facing the country. In this way, the signing statement took on the form of a command while retaining the façade of a persuasive rhetoric.

Nonetheless, by the end of 2002 the G.W. Bush administration was using signing statements in a more aggressive and legalistic manner that lacked many of the oratorical elements that had defined the signing statement as a genre. The changes in how signing statements were composed outlined above should not be understood as altogether eliminate the old generic constraints. Instead, these changes should be understood as an example of form chasing function. As signing statements were increasingly perceived in a legalistic manner by the G.W. Bush administration, the form of the signing statement had to be modified so it would become intelligible to a legal audience.

The early signing statements identified here are remarkable in that they assert a presidential prerogative to oversee the machinations of executive agencies, often in a rather belligerent manner. That said, these early signing do show a certain degree of deference, in all but the most extreme cases, that acknowledges that Congress has a role in overseeing the executive branch, even if the President can exercise some control over that oversight. While expressing objections, these signing statements acknowledge the legitimacy of congressional action, especially where the general thrust of that action is designed to empower the executive branch. In later signing statements, when Congress attempted to compel President G. W. Bush to act, there was an even stronger reaction.

Fighting Oversight

In the signing statements discussed above the legislation in question is primarily concerned with Congressional oversight of the executive branch. Because Congress was

largely supportive of the decisions made by the G.W. Bush administration, the primary concern in most of the legislation passed was limited to oversight, rather than dictating what courses of action the President should take. As time progressed and congressional support for the terror wars began to wane, some legislative changes were made that were contested more vigorously and demonstrated the full reach of the signing statement as a presidential power.

The first of the signing statements that had to address a more combative congressional environment arose much earlier in the G.W. Bush administration. On October 16, 2002, George W. Bush signed the resolution authorizing the use of military force in Iraq. Although the initial authorization for the use of military force against those responsible for the attacks on Sept. 11, 2001, had nearly unanimous support and was barely contested, the Authorization for the Use of Military Force in Iraq a year later created a rigorous debate. In the end the bill passed by a wide margin, yet in the lead up to the passage of the authorization, the debate over whether or not the use of force was justified was substantial. For the Bush administration this meant a signing statement had to be drafted that did not merely offer a line-by-line approach to the legislation, but sought to reconcile the parties in the debate while defending the ability of the President to exercise the ultimate decision on whether or not to use force.

To do this, the statement argued that the resolution itself was a sign of unity in the face of the threat posed by Iraq. According to the statement, this sign was significant not just to prove to the country that the government was unified, but to prove to the international community and in particular the United Nations Security Council (UNSC)

and Iraq that the U.S. was united against the perceived threat to international security posed by Iraq. By positing unity as a tool to pressure the government of Iraq into compliance and subsequently to avoid conflict; this signing statement accomplished two important goals. First, it reconciled the parties to the debate in a position secondary to the greater authority provided by the executive branch. Second, the statement subtly placed those who dissented as a threat to unity that amplified the perceived danger posed by the Iraqi regime.

The introductory paragraph of this signing statement might leave the impression that the statement was intended to be an aggressive critique of dissenters against G.W. Bush's authorization. In fact this was not and could not be the case. The strength of the dissent against the authorization made a purely aggressive strategy a poor approach given the likelihood that it would spur a significant backlash. Short of the creation of another resolution rescinding the authorization (which would take a very long time and face immense political hurdles to passage), it is unclear what the dissenting members of Congress could do, given the extent to which the G.W. Bush administration had already pushed the powers of the presidency, and risking a backlash from Congress could not have seemed like a good idea.

This is why the subsequent paragraph attempted to frame the dissent and contention as Congress passed the authorization in a manner that supported the unity frame in the preceding paragraph. This was done by stating, "The debate over this resolution in the Congress was in the finest traditions of American democracy. There is no social or political force greater than a free people united in a common and compelling

objective. It is for that reason that I sought an additional resolution of support from the Congress to use force against Iraq, should force become necessary (para. 2)."[110] What was subtly is accomplished is an acknowledgment that there was significant debate, but with the passage of the resolution, the debate had been concluded and the die cast. The debaters in this instance were credited for their contribution to the "finest traditions of American democracy" at the same time that they were now united with other free people in a common and compelling objective. In order for this to work, the audience has to be willing to presume that once Congress has rendered a decision, all space for disagreement had effectively been surrendered. Although this was not true, to the extent that the audience was willing to acknowledge the democratic nature of Congress, they are also obligated to acknowledge that Congressional action must be binding. This signing statement simplifies the democratic elements of Congress to merely having a debate, then a vote that results in a binding and unified point of view. Because of this, future dissent in Congress could be marginalized as mere rabble rousing rather than a reasoned critique of a past decision.

This approach was coupled with a critique of the resolution itself. Concerned that the authorization might be used as a means to constrain the ability of the President to pursue a military option to deal with Iraq, the G.W. Bush administration sought to develop an independent authority to pursue the WOT. The need for such an authority rested on the notion that if Congress could pass a resolution authorizing the use of force, another resolution could be passed unauthorizing the use of force. Should such an event

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[110] Bush, George W., "Statement on Signing the Authorization for Use of Military Force Against Iraq Resolution of 2002," October 16, 2002.Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. http://www.presidency.ucsb.edu/ws/?pid=64386.

take place, the President would need to have established an independent authority to use military force or be compelled to break off the conflict. With this concern in mind the statement proceeded to undermine the significance of the resolution stating:

> There is no social or political force greater than a free people united in a common and compelling objective. It is for that reason that I sought an additional resolution of support from the Congress to use force against Iraq, should force become necessary. While I appreciate receiving that support, my request for it did not, and my signing this resolution does not, constitute any change in the longstanding positions of the executive branch on either the President's constitutional authority to use force to deter, prevent, or respond to aggression or other threats to U.S. interests or on the constitutionality of the War Powers Resolution. On the important question of the threat posed by Iraq, however, the views and goals of the Congress, as expressed in H.J. Res. 114 and previous congressional resolutions and enactments, and those of the President are the same (2).[111]

In attempting to reconcile the need for unity with reserving the presidential authority to go it alone, this signing statement reveals much about how the G.W. Bush administration perceived the relationship between the executive branch and Congress. In this paragraph unity is described as a sufficient, but not necessary, force in the War on Terror. The statement acknowledges that unity is the greatest social and political force available, which makes this resolution an important sign. Yet the next sentence belies this conclusion. Referring to the authorization as an "additional resolution," ostensibly (although not clearly stated) in addition to the original authorization for the use of military force against those responsible for the attacks of Sept. 11, gives the impression that this resolution was in fact redundant even if the President believes it was an important sign of the unity in the United States government.

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[111] Bush, George W., "Statement on Signing the Authorization for Use of Military Force Against Iraq Resolution of 2002," October 16, 2002.Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. http://www.presidency.ucsb.edu/ws/?pid=64386.

Beyond the question of how this authorization functions as a sign, the objective behind the authorization demonstrates that congressional commitment to such unity is also suspect. The objective as stated in the preceding paragraph as forcing Iraq to rid itself of weapons of mass destruction, submit to all UN weapons searches, and "and in [sic] its support for terrorists."[112] This statement posits the forced compliance of Iraq as the shared objective that unites the country behind the decisions taken by the President. The pairing of this objective with the process of unifying the country belies and papers over the contentious debate prior to the passage of the resolution as well as the divided nature of the vote that distinguished the Authorization for the Use of Military Force in Iraq from the Authorization for the Use of Military Force Against the Terrorists.

The subsequent sentence goes even farther by holding that the executive branch did not require an authorization to use military force. Citing a "long standing position of the executive branch," the statement outlines two independent reasons why the executive does not require action by the legislative branch to justify the use of military force. Part of this sentence fits well within the traditionally accepted framework for the use of military force by the President. Although a declaration of war or at least an authorization for the use of force would be required to continue a sustained engagement, it has been accepted that in moments of crisis a President may use the military to respond to a quickly developing threat. So when G.W. Bush says that the President has the authority to use force to "deter, prevent, or respond to aggression or other threats to U.S. interests," he would be correct from the generally accepted point of view under certain

[112] The use of the word "in" rather than "and" appears to be a simple mistake, but one that perhaps indicates that the signing statement was written from dictation.

circumstances. In the instance of this authorization, however, such a reminder makes little sense, given that it would only in practical terms come into play when the authorization for the use of force is rescinded. In such an instance it would be at best a stretch to argue that the President was responding to a rapidly developing crisis rather than a legislatively mandated shift in U.S. foreign policy.

Similarly, the inclusion of a "long standing position of the executive branch…on the constitutionality of the War Powers Resolution" raises concerns. In part, this is because it is unclear what the long standing position on the constitutionality of the War Powers Resolution would be. No further explanation is offered here, and there is no direction on where to look for an explanation of this position. The statement itself is particularly vague, and depending on how it is read could produce multiple meanings. In context one could read from the tone in the earlier part of the sentence that the position of the executive branch is that the War Powers Resolution infringes on the power of the President to use force in a manner that is unconstitutional. Yet the specific reason or way in which the resolution is unconstitutional remains unclear.

The rest of the statement proceeds to argue that the concerns raised over the question of the authority of the President to use the military without authorization from Congress are not germane in this context given the shared goals of the president and Congress. This signing statement then has completed a complex strategic navigation of explaining the significance of the authorization as a symbolic act, while downplaying the significance of the authorization as an effectual piece of legislation. The contradictory nature of this move is only reconcilable when one realizes that the author views the goal

of "winning" the War on Terror as co-extensive with expanding the power of the executive branch. So when the statement says that the authorization is a powerful tool, its power is in signifying the unity of the country behind a powerful executive who does not need the authorization to act but is given the authorization in any case. In short, this signing statement, demonstrates the power of the presidency by rendering congressional authorizations for the use of force unnecessary, redundant, and purely symbolic in the face of a unified executive branch.

What is significant in this effort is not that any new policy is announced, although depending on how the reader chooses to interpret the part of the sentence discussing the War Powers Resolution, a dramatic policy shift may be briefly mentioned. Rather, the significant rhetorical and political move is the strategic linking of the War on Terror and broader executive authority to use military force. Such a linkage means that the need for a War on Terror means that a strong executive is equally necessary and the continued existence of a terrorist threat (because no threat can ever be entirely eliminated) means that there are no circumstances under which the executive branch would lose this authority.

The Sovereign Power of the President

The use of signing statements under the G.W. Bush administration continued unabated, but with little recognition until surprisingly late in the President's tenure. Although in academic circles some concerns had been raised, not in the least part because of the efforts to popularize the signing statement by former employees of the White House such as Steven Calabresi and John Yoo; there was limited public recognition that

signing statements existed outside of a simple celebratory address on important pieces of legislation. It would take a particularly aggressive use of the signing statement by the G.W. Bush administration to introduce the signing statement into the public lexicon, and make clear just what the possible uses of the signing statement are.

On December 30, 2005, the United States Congress passed the "Detainee Treatment Act of 2005" as a provision in the "Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006." The bill itself was controversial because it seemed to constrain and eliminate some core policies of the G. W. Bush administration in the terror wars. Notable among these policies were indefinite detention of persons suspected of engaging in or abetting terrorist activity, the use of enhanced interrogation techniques, and the suspension of habeas corpus for those suspected of engaging in terrorism. Much of the work done to advocate on behalf of the Detainee Treatment Act was done by Republican Senator John McCain. As a Navy veteran who had been a prisoner of war during the Vietnam War Senator McCain knew better than most the fundamental ethical problem created by the policies of the G.W. Bush administration. McCain's attempt to reform the detention and interrogation program placed him in opposition to most of his fellow conservative politicians who considered the use of indefinite detention and enhanced interrogation necessary to pursue the terror wars.

Fundamentally what was at stake in the passage of this provision was the ability of Congress to constrain the authority of the presidency to make decisions not just about a class of persons, but about the treatment of individual persons without what is afforded

in a court of law. These policies had been a fundamental, if controversial feature of the G.W. Bush administration's approach to intelligence gathering in the terror wars. At the forefront of the effort to defend these practices was the so called "Torture Memo" primarily drafted by Deputy Assistant Attorney General John C. Yoo and signed by Assistant Attorney General Jay S. Bybee. Bybee, of course, was one of the original members of the LSWG, and the author Yoo has become synonymous not only with the use of enhanced interrogation but also with the use of signing statements. In this context, the power held by the DOJ to influence foreign policy in the terror wars is both clear and disturbing. It also demonstrates the conditions that created the need for legislative action to modify the policies used by the G.W. Bush administration to pursue the terror wars.

The memos themselves assert a legal defense of the use of torture, not under United States law, but under international law. The core of the argument asserted in these memos is that although the United States originally signed the Rome Statute that created the court, it has not ratified the treaty that includes the Rome Statute, which excludes the United States from the jurisdiction of the court. Moreover, when the United States signed the Rome Statute, it did so with reservations that carve out a legal space permitting the use of enhanced interrogation techniques by the United States. A separate issue raised in the memo is the question of whether or not the use of enhanced interrogation violates the laws of the United States. The conclusion is that current circumstances should be understood as a state of war, and the United States does not face a constitutional or legal problem in the use of extraordinary techniques to resolve the

conflict. At the very least, prosecution for any conceivable crime resulting from the use of enhanced interrogation would be impossible.

A close reading of these memos is a worthy endeavor, but one that falls outside of the scope of this project. For my purposes, what should be noted is the theme that cuts across the distinct claims, the notion that the U.S. government exists outside of an existing order either because it is entirely independent and sovereign, or because circumstances permit the government to suspend the function of its own laws in defense of the sovereign. That the DOJ would express such an opinion is surprising in that it fundamentally denies the ability of that office to act on what ostensibly would be one of its core responsibilities, prosecuting persons engaged in unlawful actions. Such a response only makes sense when it is acknowledged that in this case, the authors of the memo both had privileged relationships to the office of the President. In the case of John Yoo, this would culminate in a failed bid to take over the job of director of the Office of Legal Counsel in the DOJ (giving him greater access to the President), and in the case of Jay Bybee, an eventual appointment to the 9th Circuit Court of Appeals. This is not to say that the persons in question benefited from providing obliging council, but instead to say that they clearly had a privileged relationship to the decision makers within the White House.

These memos, initially secret, were leaked to the press in 2004 a few months after the leak of the photos taken at Abu Ghraib. This pair of leaks, combined with a decline in support for the ongoing wars in Iraq and Afghanistan, created significant pressure to interrogate the policies involved in the terror wars. Perhaps the best indication of how

strong the pressure for change was can be found in the vote count, with the Detainee Treatment Act (DTA) passing the Senate by a 90 to 9 margin. Perhaps the best indication of the partisan divide on the issue was that the 9 Senators who voted against the bill were Republicans. The DTA was a major change and in many ways a repudiation of the policies pursued by the G.W. Bush administration during his first term.

The DTA was all the more significant in that it included a negotiation between Congress and the President. Prior to the passage of the bill, Senator McCain met with George W. Bush and received a promise that the legislation would be signed without a signing statement being issued. Of course, despite this promise, the G.W. Bush administration issued a signing statement by email after passage of the law, prompting a rebuke from Senator McCain, a line of aggressive questioning during Samuel Alito's ongoing nomination hearings, and one of the first times a signing statement received significant media attention. As this story broke it raised the question of just what a signing statement could be used to accomplish.

The DTA passed as a part of a larger supplemental appropriations bill that was sufficiently important that voting against the bill would have been politically inexpedient in Congress and outrageously unpopular for the President to veto. The signing statement in this case was a means to reject the DTA while accepting provisions funding the military, hurricane Katrina recovery efforts, and preparation for a potential flu pandemic. Toward that end, the signing statement amicably began by acknowledging the importance of those provisions. Subsequently the signing statement was less than amicable.

Although the signing statement notably argued against the constraints on spending in the favored provisions, the greater focus was the objection to the Detainee Treatment Act. The statement asserts two distinct justifications for the President to disregard the mandates of the section. The first is the role of the President as supervisor of the unitary executive branch and the second is the role of the President as Commander in Chief of the United States Military. These separate justifications both rely on the already alluded to, if not explicitly described, notion that the executive branch exists as an entirely separate apparatus that operates outside the scope of legislative direction. This is reinforced in the next sentence when the statement outlines the justifications for ignoring the provisions that would have given persons detained in the War on Terror the ability to seek recourse from the U.S. courts.

The way in which this objection is voiced is demonstrative of the techniques found in the other statements. First, they are intentionally vague. The fundamental argument in this signing statement is based on the same general notions espoused in earlier signing statements that the executive branch possesses certain constitutional powers beyond the ability of Congress to establish binding limitation or oversight. As the statement plainly states:

> The executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President, evidenced in Title X, of protecting the American people from further terrorist attacks (para. 8).[113]

[113] Bush, George W., "Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006",

Such an egregious run-on sentence does not lend itself particularly well to legislative interpretation. Indeed, it is an attempt to assert in a very compact and obscure manner an array of diverse justifications for ignoring the provision. In this instance, the same two justifications found in other signing statements, the power of the President as Commander in Chief and the obligation to supervise the unitary executive branch, are asserted as reasons for disregarding the provisions in the act as a whole. That no statement to this point has articulated what constitutes "the unitary executive branch" or what are the powers of the Commander in Chief indicates a very broad interpretation of the phrase "in a manner consistent with." Read this way, the signing statement is a justification for the President to ignore the provisions of the act altogether, as the provisions limit the ability of the President to render a decision independent of Congress.

Beyond the broad nature of the claims made, the signing statement relies on a disconcerting legal precedent to invalidate the act. The second sentence of the statement argues, "Further, in light of the principles enunciated by the Supreme Court of the United States in 2001 in *Alexander v. Sandoval*, and noting that the text and structure of Title X do not create a private right of action to enforce Title X, the executive branch shall construe Title X not to create a private right of action (para. 8)."[114] One might reasonably ask, in light of this signing statement, what *Alexander v. Sandoval*, a case dealing with driver's license tests, might have to do with the practice of indefinite detention.

December 30, 2005. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. http://www.presidency.ucsb.edu/ws/?pid=65259.

[114] Bush, George W., "Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006", December 30, 2005. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. http://www.presidency.ucsb.edu/ws/?pid=65259.

In *Alexander v. Sandoval* the Supreme Court ruled that Martha Sandoval did not have a private right of action, meaning that she could not pursue a suit against the state of Alabama as an individual on behalf of a broader class of persons. In this case Martha Sandoval sued the Alabama Director of Public Safety, James Alexander, for offering driver's license tests only in English after Alabama passed a state level constitutional amendment making English the state language. The Supreme Court ruled that Sandoval did not have a private right of action (meaning that she did not have basis for the suit) because the statute (the state constitution) did not engage in intentional discrimination against a protected class of citizens, meaning that there was no private right of action under the Civil Rights Act of 1964 which prohibits discrimination on the basis of race, color, religion, sex, or national origin. The precedent whereby a lack of intentional discrimination against a protected class of citizens limited the ability of the court to render a ruling in the case was applied to the DTA to limit the legal remedy provided to detained persons in the act. This line of argumentation relies on the notion that those who are detained indefinitely do not qualify as a particular class of persons who are subject to discrimination, but rather exist as non-citizens who lack the ability to act based on discrimination against a class of persons. This notion, although perhaps not entirely legally untenable, relies on a series of presumptions that are subject to a wide array of criticisms, which are not anticipated by the legal precedent selected. The tenuous nature of the link between *Alexander v. Sandoval* and the practice of indefinite detention is demonstrated when the signing statement itself does not articulate the bearing of

Alexander v. Sandoval on the treatment of detainees, but rather presumes that the assertion of a legal precedent is sufficient to place the claim beyond reproach.

What is problematic about this argument is that the legislation created by Congress was designed to avoid this problem by creating a process whereby those detained indefinitely would face military tribunals. Instead, the legislation created a right of action for detained persons where the inability on the part of the government to demonstrate a justification for persons to be detained would create the basis for a suit on the part of those detained to earn their release. So the legislation itself did not rely on the detained persons being granted a right of private action as addressed by *Alexander v. Sandoval*, but instead relies on the creation of a disposition on the detained persons by the government. Nonetheless, this precedent is asserted as a basis for denying the ability of the Supreme Court to review the cases of persons who have been indefinitely detained whereas those tried by a military tribunal would typically place an appeal.

The third sentence of the same paragraph demonstrates that perhaps the President doth protest too much:

> Finally, given the decision of the Congress reflected in subsections 1005(e) and 1005(h) that the amendments made to section 2241 of title 28, United States Code, shall apply to past, present, and future actions, including applications for writs of habeas corpus, described in that section, and noting that section 1005 does not confer any constitutional right upon an alien detained abroad as an enemy combatant, the executive branch shall construe section 1005 to preclude the Federal courts from exercising subject matter jurisdiction over any existing or future action, including applications for writs of habeas corpus, described in section 1005 (para. 8).[115]

[115] Bush, George W., "Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006",

The obvious critique of this sentence begins with the use of the term "Finally" which seems to indicate either an exhaustion with the line of argumentation or a final objection that surpasses previous scrutiny. In this case the argument is directed toward Congress' attempt to provide, if not habeas corpus, then at least the right for persons detained abroad to seek a tribunal where evidence would be presented against them. This sentence eliminates the basis for a private right of action, under habeas corpus, for individuals to argue for their ability to face the evidence presented against them in a court of law.

This makes sense, when understood from the perspective of an administration committed to a policy of indefinite detention. The ability to pursue legal action on the basis that the defendant did nothing wrong, even if it is not literal habeas corpus in the sense that a body is not present, creates a mandate for a trial. By rejecting this provision the Bush administration created the circumstances under which the G.W. Bush administration could deny any right to a tribunal of any sort. Read in that sense, the G.W. Bush administration was rejecting not only the reformist approach of the Detainee Treatment Act, but the notion that the executive branch ought to be accountable to Congress, or that the Court had any right to act on a matter that the President reserved for the executive branch.

This brief section from the signing statement was used to roundly dismiss the entirety of the Detainee Treatment Act in practice if not in law. In the United States Code the provisions of the act remained, but the administration ignored them and continued the same practices of indefinite detention and enhanced interrogation. The

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December 30, 2005. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. http://www.presidency.ucsb.edu/ws/?pid=65259.

signing statement here demonstrates the fundamental structure of the relationship between the signing statement and law; it operates outside of and independent of the law. Because the signing statement as a genre has its origin in an entirely different mode of communication, the oral tradition rather than the written legal tradition, it is well suited to operating outside the existing legal order. By nature the signing statement bends toward argumentative rather than legislative language; yet by relying on the extant power of the presidency in conjunction with a concerted effort to establish the signing statement as a legitimate means for the President to exercise the power of the office the George W. Bush administration was able to deploy the signing statement as a tool for avoiding the limits imposed by legislative action.

What is telling about this signing statement is just how it intersected with the existing detention program. As Mayer notes, the indefinite detention program was a part of a "New Paradigm" that emphasized the need for a distinct system of addressing detained persons. Of particular import in this system was the creation of an ad hoc system for treating detained persons that operated outside the traditional legal system (51-52).[116] What the signing statement afforded was a genre of speech that could keep the detention program outside of the legal system, problematizing efforts to provide oversight from the Courts or Congress.

Obama Continues

The practice of using signing statements did not end with George W. Bush. The backlash from the signing statement attached to the Detainee Treatment Act was

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[116] Mayer, Jane. *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals*, (New York: Double Day, 2008), 51-52.

significant, ultimately resulting in a bill sponsored by then Senator Arlen Spectre to ban the use of signing statements. The bill ultimately would die in committee in two different congressional sessions. The American Bar Association investigated the use of signing statements and issued a finding that the George W. Bush administration's use of them was a clear abuse of presidential power. It even was raised as an issue in the 2008 election with Obama criticizing their use.

Despite this criticism, the practice continued in the Obama administration. In an example that is particularly pointed, Obama issued a signing statement in response to the "Ike Skelton National Defense Authorization Act for Fiscal Year 2011." Of particular interest is a section in the act which prohibited Obama from pursuing a plan to shift the persons detained in Guantanamo to the United States to provide detained persons with a basis to begin legal proceedings to resolve their status. This would both end the need for a detention facility at Guantanamo Bay and the practice of indefinite detention.

To counter this move a Republican-led House of Representatives added an amendment to the National Defense Authorization Act, which is required to fund the military. This amendment prohibited the use of funds for the transfer of persons detained at Guantanamo on or after January 20, 2009, the date that Barack Obama took office. It also prohibited the use of funds to transfer persons who are detained by the United States to their country of origin except where a lengthy list of requirements are met, and Congress is subsequently provided with a written certification from the Secretary of Defense with concurrence from the Secretary of State 30 days prior to the transfer, essentially making repatriation of detained persons as close to impossible as Congress

could manage. The decision by Congress to prohibit the use of funds is significant, attempting plainly to ban the transfer of detained persons would clearly infringe on the role of the President as Commander in Chief and might be deemed unconstitutional. By prohibiting use of funds, Congress could avoid this problem by using its power to determine appropriations without raising the same constitutional dilemma.

The Obama administration responded by issuing a signing statement that relied on similar justifications to those used by the G.W. Bush administration. What is noteworthy is that although the fundamental argument remains the same, there are subtle shifts in the language used which seem to be responsive to the criticisms leveled at the G.W. Bush administration. The relevant portion of the statement begins by stating:

> Section 1032 bars the use of funds authorized to be appropriated by this Act for fiscal year 2011 to transfer Guantanamo detainees into the United States, and section 1033 bars the use of certain funds to transfer detainees to the custody or effective control of foreign countries unless specified conditions are met. Section 1032 represents a dangerous and unprecedented challenge to critical executive branch authority to determine when and where to prosecute Guantanamo detainees, based on the facts and the circumstances of each case and our national security interests. The prosecution of terrorists in Federal court is a powerful tool in our efforts to protect the Nation and must be among the options available to us. Any attempt to deprive the executive branch of that tool undermines our Nation's counterterrorism efforts and has the potential to harm our national security (Para 2).[117]

The key change in the terms used to describe the power of the executive branch here is telling. Rather than asserting the power of a unitary executive or the power of the President as Commander in Chief, this statement argues for an equally unclear "executive branch authority." Indeed, a fair comparison of the signing statements would conclude as

[117] Obama, Barack "Statement on Signing the Ike Skelton National Defense Authorization Act for Fiscal Year 2011," January 7, 2011. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. http://www.presidency.ucsb.edu/ws/?pid=88886.

dubious and readily contestable is the notion of a "unitary executive," at least as circulated as a more precise notion of what the powers of the office of President are. Even if that notion grants far more power than would typically be assumed of the branch, at least it has some clarity.

By contrast the language used by the Obama administration is more abstract. The structure of the sentence indicates that the "executive branch authority" is specific to the treatment of detainees, but leaves unanswered the broader question of why the executive branch has that authority rather than the judiciary. There does not appear to be a clear distinction between the way the Obama administration understands the relationship between the branches and the way that relationship was understood by the G.W. Bush administration. This is best evidenced in the second sentence, where the President asserts the right of the executive to determine how to proceed with individual detainees on a case by case basis, reserving for himself the same powers that G.W. Bush had asserted to render an individual decision on the life of persons detained by the military. The consequence is clear; even when a President seeks to articulate a different policy, relying on the same sources of legitimacy and authority, retains the possibility same abuses in the future.

It is tempting to say that even if Obama claimed the same powers as the G.W. Bush administration, Obama did so in order to resolve the injustices of that administration. Such a claim has merit in that at least creating the conditions under which those who have been ill-treated by the government can seek to change the conditions under which they are held moves in the same direction as a more genuine

change. Unfortunately, the justification offered by the Obama administration undermines the notion that the President was willing to surrender control over detained persons and the larger objective of securing the country against external threats. As Obama put it, the use of the Federal courts to prosecute detained persons is "a powerful tool" required to preserve national security. Without it, counterterrorism efforts and national security would be at risk. Although there is no explanation of why this is true, the mention of counterterrorism and national security echoes the already established norms from the G.W. Bush administration. The repeated use of signing statements by the G.W. Bush administration and their continued use by the Obama administration by this point had established that where there was a credible articulation of national security and terror as issues of concern with a policy, the President can override legislative action.

The subsequent paragraph worked in a similar manner. Relying on the already established appeals to national security, President Obama applied a different approach in the second paragraph that fulfilled the same function:

> With respect to section 1033, the restrictions on the transfer of detainees to the custody or effective control of foreign countries interfere with the authority of the executive branch to make important and consequential foreign policy and national security determinations regarding whether and under what circumstances such transfers should occur in the context of an ongoing armed conflict. We must have the ability to act swiftly and to have broad flexibility in conducting our negotiations with foreign countries. The executive branch has sought and obtained from countries that are prospective recipients of Guantanamo detainees assurances that they will take or have taken measures reasonably designed to be effective in preventing, or ensuring against, returned detainees taking action to threaten the United States or engage in terrorist activities. Consistent with existing statutes, the executive branch has kept the Congress informed about these assurances and notified the Congress prior to transfers. Requiring the executive branch to certify to additional conditions would hinder the conduct of delicate negotiations with foreign countries and

> therefore the effort to conclude detainee transfers in accord with our national security (para. 3).[118]

This response adds a wrinkle to the ways that the Obama administration understands the power of the executive branch. Surprisingly, it is not so different from the understanding held by the G.W. Bush administration. In this signing statement the primary justification for retaining control over how detainees are treated, more specifically when and where they can be repatriated, is "flexibility." Obama is positing the need for the President to have a flexible response to geopolitical problems raised by the practice of indefinite detention.

The reference to flexibility echoes the arguments made under the G.W. Bush administration in favor of a flexible response to the contingencies created by the terror wars. Although the Presidents had very different intentions for how they might use this flexibility, the justification they relied on was the same. Ultimately, the President had to be able to respond to contingency by taking the action deemed most prudent, even if it required a decidedly undemocratic approach. The language used indicates that even if Barack Obama had no investment in unitary executive theory, he believed in one of its core tenets.

The interesting corollary that Obama may be gesturing at is the emphasis on foreign negotiation. Negotiations have historically been one of the areas where Presidents have been given a great deal of discretion. Referencing it in this signing statement asserts an external justification for the flexibility that Obama argues for. The

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[118] Obama, Barack "Statement on Signing the Ike Skelton National Defense Authorization Act for Fiscal Year 2011," January 7, 2011. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. http://www.presidency.ucsb.edu/ws/?pid=88886.

signing statement here becomes a means to categorize the actions described in the act as under the prerogative of the executive branch. In other words, rather than simply asserting a broad prerogative under the unitary executive, Obama attempts to draw distinctions and defend particular areas as the domain of the executive branch.

This is also part of a conciliatory gesture. The Obama administration subsequently describes ongoing attempts to keep Congress informed about ongoing activities regarding detainees to discredit the notion that further reporting or permission is required. This move is intended to undermine the public credibility of the requirements outlined in the act. At the same time, it is designed to reassure Congress that the President is acting in good faith with the interests of Congress. The response by the Obama administration is an attempt to sell Congress not just on good faith in regard to detainees, but also on good faith in the use of broad presidential authority.

For the Obama administration this is a difficult task for two distinct reasons, which are not mutually reinforcing. The first is a lack of popularity with an opposition-led Congress. Republican opposition to the Obama administration for a diverse array of reasons has been extremely well documented. The second is a lack of proximity to the events used to expand presidential authority. Without the urgency felt in the early days of the terror wars, Obama was forced to adopt a more subtle approach to the assertion of presidential powers than his predecessor. The result is the more conciliatory and amicable language and explanation found in this signing statement.

This signing statement demonstrates many of the same commitments found in those pioneered by the G.W. Bush administration. One could argue that this is a simple

response to the particular circumstances created by the terror wars. Such an argument would make a great deal of sense given the perception within the G.W. Bush administration that such circumstances as those created by the attacks of September 11, 2001, required an extraordinary response. The problem with such an argument is that it disregards the historical evidence indicating that the use of signing statements are deeply embedded in conservative thought about the role of the presidency. Of importance, the argumentative positions posited in the signing statements went beyond responding to crisis, to assert a constitutional vision of an expanded presidency far beyond the contingent conditions created by the terror wars.

Equally tempting is the argument that Obama departed from this view of the presidency. In some ways this is true; the Obama signing statements tend to be worded in a more amicable manner that fits more closely with earlier signing statements. Yet they relied on much the same justifications as those found in the G.W. Bush signing statements. So long as those justifications are considered to be a legitimate basis for presidential action, the conclusion they provide, that the President has the sole authority to decide the extent of their powers, will remain the same. Although Obama may be given credit for a more restrained use of signing statements, having issued fewer and in some ways less confrontational statements than G.W. Bush, his practices were equally demonstrative of the way signing statements could be used to subvert legislative action.

Repositioning the Signing Statement

One of the curious moves made during the Obama administration in the use of signing statements was a departure from the notion of a unified executive branch. Where

the George W. Bush administration emphasized a defense of signing statements that relied on the assertion of UET as a justification for expansive presidential action, the linguistic hallmarks of that ideological approach were almost entirely absent from the Obama administration signing statements. This is not to say that the signing statements issued by the Obama administration were prima facie less problematic, it does point towards the need for a more nuanced understanding of how the use of signing statements by the Obama administration differed from the George W. Bush administration.

Following the 2010 midterm elections which gave the Republican Party control over the House of Representatives the Obama administration faced a hostile Congress. One of the expressions of this hostility would be found in the yearly National Defense Authorization Acts which would, because of their necessity for the ongoing funding of the military, become a repository for pieces of legislation that would be vetoed if passed separately. Against this backdrop, the ongoing disagreement with Congress over the treatment of detained persons continued.

One example of this can be found in the National Defense Authorization Act of 2012 (NDAA 2012). A year removed from the signing statement resisting congressional attempts to sustain the practice of indefinite detention by withholding funding, the Obama administration issued another signing statement that responded to language in NDAA 2012 that sought to constrain more directly the decision making power of the President.

The provisions of greatest concern are sections 1022-1029 which outlined the categories of persons who could be subject to military detention and subsequently how

they could be tried, as well as continuing to block the funding of the efforts to transfer detainees. At the moment of its passage, section 1022 was subject to the most public criticism, for an apparent vagueness that could be interpreted to refer even to those who reported on Al Qaeda because such reporting could provide "substantial support" for the organization. Culminating in *Hedges v. Obama*, a court case led by the well-known reporter and activist Christopher Hedges, there was significant public scrutiny over the potential reach of the provision. Although the Obama administration's signing statement would not speak to that particular concern directly, the atmosphere of public scrutiny influenced the nature of the signing statement issued.

It was against that backdrop that the Obama administration issued a signing statement that reads quite differently from those of the George W. Bush administration and other Obama administration signing statements. The statement, after providing an initial explanation of why he had signed NDAA 2012 and describing the success of his policies in pursuing the terror wars, outlines a general objection:

> Against that record of success, some in Congress continue to insist upon restricting the options available to our counterterrorism professionals and interfering with the very operations that have kept us safe. My Administration has consistently opposed such measures. Ultimately, I decided to sign this bill not only because of the critically important services it provides for our forces and their families and the national security programs it authorizes, but also because the Congress revised provisions that otherwise would have jeopardized the safety, security, and liberty of the American people. Moving forward, my Administration will interpret and implement the provisions described below in a manner that best preserves the flexibility on which our safety depends and upholds the values on which this country was founded (Para. 3).[119]

[119] Obama, Barack. "Statement on Signing the National Defense Authorization Act for Fiscal Year 2012." December 31, 2011. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. http://www.presidency.ucsb.edu/ws/index.php?pid=98513.

In this general expression of dissent there are three important elements. First, the actions of Congress are framed in a contrarian manner that undermines the success in the terror wars described above to delegitimize congressional action. Second, the more favorable action taken by Congress to ameliorate the concerns of the presidency are outlined as the conditions which made it possible for the President to take action. Third, the President asserts a role in interpreting provisions in keeping with the flexibility required to maintain the safety and values "on which this country was founded."

In short, this paragraph poses a different approach from the Bush administration in taking exception to parts of legislation. The first two elements work to posit the President, not as the unified power over the legislative branch, but as a participant in competition with that branch. This approach subtly shifts the focus from the question of UET, to one of more direct competition between the presidential agenda and the will of Congress. In this shift, the shared values explicitly named and alluded to by the President become shared concepts that both branches contest, but nonetheless assent to their importance.

In place of an emphasis on unity, the role of the President is described in terms of flexibility necessary to pursue those shared goals. In this view, flexibility infers the ability and need for presidential interpretation to play a more central role in the practice of governance. This subtle reframing of the role of the President provides a distinct view from the approach taken by the George W.

Bush administration, in that it does not assert a role as final arbiter over the acceptability of the laws, but instead the need to have a free hand in interpreting the law.

This view is supported by the first line of the subsequent paragraph, which points out that section 1021 which affirmed the authority of the President to carry out ongoing detention programs, “breaks no new ground and is unnecessary.” This wording, not aimed at taking exception, but voicing an interpretation is representative of just such an approach. By not taking exception, but emphasizing the view of the President that the language is redundant, the statement affirms the role of the President as interpreter without taking the more dubiously constitutional step of attempting to mitigate legislative action. Going a step further the statement points out that the restrictions in that section had been advocated by the Obama administration.

This is not to say that the use of signing statements by the Obama administration abandons altogether the practice of mitigating legislative action. In the two subsequent paragraphs the Obama administration outlines a separate approach. The first paragraph holds that:

> Section 1022 seeks to require military custody for a narrow category of non-citizen detainees who are "captured in the course of hostilities authorized by the Authorization for Use of Military Force." This section is ill-conceived and will do nothing to improve the security of the United States. The executive branch already has the authority to detain in military custody those members of al-Qa'ida who are captured in the course of hostilities authorized by the AUMF, and as Commander in Chief I have directed the military to do so where appropriate. I reject any approach that would mandate military custody where law enforcement provides the best method of incapacitating a terrorist threat. While section 1022 is

> unnecessary and has the potential to create uncertainty, I have signed the bill because I believe that this section can be interpreted and applied in a manner that avoids undue harm to our current operations (para. 5).[120]

In this paragraph the statement positions the executive branch in a more adversarial mode. In the first instance, the unnecessary (if arguably accurate) conclusion that the section was "ill-conceived" becomes an ad hominem attack on the credibility of the provision by blaming Congress for a lack of foresight in rendering a decision on foreign policy. Second, the term "reject any approach" positions the Obama administration as opposed to Congress.

Despite this adversarial mode, the approach taken by the Obama administration is distinct from those of the Bush administration. Rather than refusing to enforce the provision, the Obama administration instead is arguing that an interpretation is available that reconciles the intention of Congress with the will of the Obama administration. This interpretation is then positioned as a necessary approach because it avoids "undue harm to our current operations." Ultimately, this approach provides an interpretation that emphasizes the desirable ends of the policy choices of the President as the standard against which the actions of the legislative branch will be measured.

The subsequent paragraph attempts to outline just how such an interpretation would work. In that paragraph the Obama administration begins by framing section 1022 as providing "the minimally acceptable amount of flexibility to protect national security." In this framing, the Obama administration posits the provision as ultimately less than ideal, but which can be workable within the parameters of a specific interpretation. The

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[120] Obama, Barack. "Statement on Signing the National Defense Authorization Act for Fiscal Year 2012." December 31, 2011. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. http://www.presidency.ucsb.edu/ws/index.php?pid=98513.

statement continues, “Specifically, I have signed this bill on the understanding that section 1022 provides the executive branch with broad authority to determine how best to implement it, and with the full unencumbered ability to waive any military custody requirement, including the option of waiving appropriate categories of cases when doing so is in the national security interests of the United States.” In this sentence the Obama administration posits an interpretation that emphasizes one paragraph within the section that allows the other provisions to be waived for the purposes of national security. In so doing, the Obama administration coopts the language of the bill to maintain the flexibility of the presidency to render a decision which is counter to the larger intent of the bill.

Later in that same paragraph, this utilitarian reading of the section is justified by the argument that, “As my administration has made clear, the only responsible way to combat the threat al-Qa’ida poses is to remain relentlessly practical, guided by the factual and legal complexities of each case and the relative strengths and weaknesses of each system.” The emphasis on practicality here poses a distinct position from that taken by the Bush administration. Where the Bush administration preferred an argument rooted in constitutional interpretation, the Obama administration is favoring a more utilitarian approach defined by the exigencies created by al-Qa’ida. Yet what is evinced here is an affirmation of a core principle found in UET that the President must have the authority to make decisions with a free hand, in this case, over the treatment of individual persons.

That this treatment is to be handled on a case by case basis is significant. In pushing for a case by case treatment for detainees the Obama administration undermines the conception of a universal set of rights due to detained persons as a category. Instead,

national security defined by the need to fight al-Qa'ida becomes the measure by which the treatment of detainees will be measured. Even as the Obama administration is positioning itself as defending an alternative to military detention, the values that guide the decision to exercise that alternative are the same values that undergird the general practice of indefinite detention. In asserting the sovereign decision over the lives of individual detainees, the signing statement renders those lives subservient to the question of U.S. national security interests.

The paragraph concludes with a remarkable holding. Pointing out that a failure to maintain the current policies of the executive branch, the Obama administration concluded, "I will therefore interpret and implement section 1022 in the manner that best preserves the same flexible approach that has served us so well for the past 3 years and that protects the ability of law enforcement professionals to obtain the evidence and cooperation they need to protect the Nation." In this conclusion the Obama administration reiterates the principle of flexibility that he argues has been crucial to his efforts. In couching flexibility as a means necessary to achieve the end, what Obama preserves is a notion that the executive is not bound by the Constitution, but rather to the exigencies of the moment.

What differentiates this signing statement from those issued by the George W. Bush administration is a language that seeks to work with the language of the legislation. Taking the greatest possible advantage of its language, the Obama administration advances an interpretation that would appear to cut against the larger intention of the bill. Nonetheless, the inclusion of an exception for universal military detention rooted in

national security left the Obama administration a reasonable basis for asserting an interpretation rooted in the principle of flexibility. This approach, emphasizing a literal interpretation of the text based on a broader principle represents a shift in technique from the norms of the Bush administration that emphasized either a deferral to language outside of the legislation, such as Supreme Court cases, or a distinct constitutional theory supporting an interpretation, to manipulating the language of the text to support a preferred interpretation of the legislation.

What this signing statement underscores is the importance of understanding genre not only in terms of constraints, but how flexibility is afforded within those constraints. For Presidents the use of signing statements affords the possibility for diverse and nuanced approaches. For the Obama administration, this took for the form of a more nuanced approach, specially tailored to make more limited interventions against the actions of Congress described not in terms of far reaching presidential power rooted in the Constitution but instead in practical reasoning required to address particular policy problems. This should not be understood as a repudiation of presidential power. Indeed, what Obama did certainly circumvented Congress. The Obama administration should not be understood as a repudiation of presidential power. Instead, the efforts of the Obama administration are better understood as an attempt to perform the office differently.

A Dangerous Genre

The transition of signing statements from a rather loose oral tradition designed to foster communication between the executive and legislative branches to a legalistic document written with the intention of interfering with the mandates of the other branch

was in the grand scheme a slow process. It began in the 19th century and did not begin to accelerate until the 21st. Indeed, until the Reagan administration the notion that such statements could directly influence policy was so unthinkable that the statements were not even published. It was not until the G.W. Bush administration that their use in this capacity became standard.

The signing statement has been described variously as a bargaining tool,[121] a line item veto,[122] a corrective against an overbearing Congress,[123] a necessary response to gridlock,[124] a desirable tool used in moderation,[125] and as a secretive means for changing policy.[126] In particular contexts, all of these descriptions are accurate. What all approaches agree on, and what is at the heart of the constitutional debate about signing statements is that they function primarily as a means for the President to exercise personal power with legal force. I propose that there is a larger function at play. In using signing statements the President is attempting to selectively incorporate the rhetorical power of the presidency into the practice of creating policy. In so doing, the President is able to operate both inside and outside the norms of constitutional practice to strategically navigate public opinion, congressional oversight, and court review.

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[121] Kelley, Christopher S., and Bryan W. Marshall. "The Last Word: Presidential Power and the Role of Signing Statements." *Presidential Studies Quarterly* 38, no. 2, (2008): pp. 248-267.
[122] Campbell, Karlyn Kohrs., and Kathleen Hall. Jamieson. *Presidents Creating the Presidency: Deeds Done in Words*. (Chicago: University of Chicago Press, 2008).
[123] Knott, Stephen F. *Rush to Judgment: George W. Bush, the War on Terror, and His Critics* (Lawrence: University Press of Kansas, 2012).
[124] Marshall, Bryan W., and Christopher S. Kelley. "Going it Alone: The Politics of Signing Statements from Reagan to Bush II." *Social Science Quarterly* 91, no. 1, (2010): 168-187.
[125] Korzi, Michael J. ""A Legitimate Function": Reconsidering Presidential Signing Statements." *Congress & The Presidency* 38, (2011): 195-216.
[126] Cooper, P. "George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements." *Presidential Studies Quarterly* 35, no. 3, (2005): 515-532.

Yet even in their new configuration signing statements retained earmarks of the oral tradition. Attempts to thank Congress and maintain a conciliatory tone mark all but the most aggressive uses of signing statements. They are still tied to the epideictic moment defined by the signing of legislation. They continue to actively frame the legislation for a diverse array of audiences. The signing statement still retains vestiges of oral language, even if they do not lend themselves to oral reading.

This is significant, because retaining the ties to the oral circumstances and traditions allows the signing statement to strategically ignore the expectations one would otherwise have of a legal document. It does not match the form or style of legislation. It is argumentative rather than declarative. It operates as a sovereign declaration rather than as an attempt to articulate a law. In short, the signing statement is uniquely positioned to operate outside of the legal system. This ability to simultaneously influence legislation while remaining outside of the legislative system mirrors the role of the presidency articulated in the signing statements in the terror wars. These statements are not merely a means to influence legislation, but represent the paradigmatic shift in the relationship between the executive and legislative branches during the terror wars.

This shift is a departure from a competitive or bargaining relationship between two peers. Instead it posits the presidency as a sovereign branch capable of exerting its will against Congress as the body that is able to render the final decision about the nature of U.S. policy. In the case of signing statements this is performed through the practice of selectively creating exceptions in the legislation passed by Congress. It functions in this way as a line-item veto, but in practice, it is a broader assertion of presidential primacy in

defining policy. The paradigm shift in the relationship between the President and Congress, expressed both in the historic evolution of signing statements and the concerted effort to develop them as a power afforded to the President, is fundamentally about developing the office of the President as a sovereign branch of government.

In the context of the War on Terror, this shift is significant. Operating at the confluence of foreign policy, war powers, and the personal power of the office of the President, the consequences of signing statements are more drastic. Under the George W. Bush administration signing statements were used to argue for an authority that goes beyond the obliging assent offered by Congress to begin the War on Terror. Signing statements were used to argue for the power of the President to suspend the normal state of affairs in order to pursue conflict based on the nature of a threat as well as the constitutional authority of the President constrained by the War Powers Resolution. Under both the Bush and Obama administrations signing statements were used to render decisions about the treatment of persons, not just as a class of persons, but in individual cases. Signing statements used by the Bush administration defended the practices of indefinite detention and enhanced interrogation with all the ethical and political questions they raise. Under the Obama administration, even as the policy became in material ways better, the treatment of detainees was still defined along the lines of national security rather than based on a broader conception of human rights.

In changing the relationship between the executive branch and Congress, the use of signing statements by the George W. Bush and Obama administrations demonstrates an essential problem in constitutional thought. The lack of willingness to commit to

democratic practice as the proper means of governance leaves open the ability of the executive to subvert the entirety of the principles of constitutionalism. The signing statement represents on a micro scale a macro paradox in constitutional thought. The arguments articulated in the signing statement reflect this paradox. They accept the principle of the legislation, while rejecting particular provisions within them. Articulating the need for the President to respond to a specific contingency, to have flexibility, to have final authority over the decisions facing the country has the function of explaining how the President exists outside the bounds of constitutional thought. The entire notion of a signing statement, conceived in the way they are used contemporaneously, is bound up with the attempt to free the presidency from the bounds of the Constitution.

For the public the consequences of this move have proven to be drastic. As Nelson writes in her critique of the Bush administration, the decision to act was not supplemented with a responsibility to defend action. Instead the Bush administration relied on the mystique of the position as Commander in Chief to mediate public sentiment so that the negative response to decision-making would be limited (135). Where Nelson emphasizes the cultural significance of the presidency, this chapter posits a complementary argument. The terror war Presidents have developed signing statements as a genre of speech which makes the development of public sentiment inherently difficult.

The barriers to public sentiment described here are threefold. First, the Constitutional interpretation under UET is posited as an authorization to act without

public consent. Second, signing statements posit obscure, obfuscating, and at times counter-intuitive interpretations that misdirect the public. Third, because signing statements as a genre are both new and no longer couched as a public address but rather as an internal discourse, the public consciousness of their use remains limited. The development of signing statements as a genre has produced a discourse that is difficult for the public to penetrate, and limits the ability of the public to muster a response.

Chapter 3: Presidential Policy Directives

One of the least well known and yet significant rhetorical tools Presidents use to pursue foreign policy objectives is the Presidential Policy Directive (PPD). Though PPDs are little appreciated they are one of the most direct means by which the President can change the foreign policy of the United States. Moreover, because the power over the PPD flows directly from the executive, and there is no reporting requirement or oversight from Congress, they offer the President an irreproachable power to change policy.

The source of this power is derived from the presumptive authority given to the President to lead on issues dealing with international affairs. The term *presumptive* here is intentional. The strongest textual defense of Presidential primacy in foreign affairs comes from the Supreme Court's decision in *Curtis-Wright* (Prakash and Ramsey 238-240).[127] The court's decision in this case, which dealt with the constitutionality of an embargo that prevented arms sales to South American countries engaged in the Chaco war, was odd in that it dealt only minimally with the interpretation of the Constitution. In the absence of clear constitutional guidance, the decision dealt with what body in the government should be given responsibility for administering to foreign affairs. The odd element of this decision is that the Court locates this responsibility in the presidency because that is the norm in other sovereign countries.

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[127] Prakash, Saikrishna B. and Ramsey, Michael D. "The Executive Power over Foreign Affairs," *Yale Law Journal* 111, No. 2, (2001): 238-240.

In their analysis of the constitutional arrangement in the United States Prakash and Ramsey offer several important explanations for this norm. First, they argue that the President was the only body with a sufficiently unified voice to communicate the will of the United States to other countries (243-244). As Prakesh and Ramsey note, this is not an argument in favor of investing the President with foreign policy decision making power; it is only an argument explaining why the President should be responsible for executing foreign policy. Prakash and Ramsey instead argue that the best constitutional support for such powers arises because Congress's power is limited by the Constitution in a more clear manner than that of the President, and that investing the President with such power was in keeping with the norms afforded 18th century monarchs (252-256).[128]

The textual explanation provided by Prakash and Ramsey is useful in that it accounts for the context in which the President was afforded foreign policy decision-making ability. That the power of the President to control foreign policy is as much a matter of custom as it is constitutional right illustrates the importance of practice in developing the power of the presidency. That the power of the President in rendering foreign policy decisions from the outset was based not on a text, but on a judicial decision rooted largely in international norms demonstrates both the importance of context and consent in how Presidents perform the office.

This chapter follows this line of argument to its logical conclusion. That the power of Presidents in performing the office is equal parts a function of consent and custom, but this consent and custom is put to work by Presidents in ways that stretch and mold that power to expand the office. PPDs have played a critical role in this process in

[128] Prakash and Ramsey, "The Executive Power over Foreign Affairs," 252-256.

establishing the power of the presidency because Presidents have used them to fundamentally change the course of U.S. policy. In so doing, a process similar to that described in the previous chapter on signing statements occurs, by taking advantage of a particular genre of speech Presidents expanded the role of the office.

The important distinction inherent in PPDs relative to other Presidential powers is that they both tend to avoid public scrutiny and are largely uncontested. Critics of the role of the presidency in foreign policy rarely focus on the particular mechanism by which this role is performed and expanded, preferring to critique the source of that power itself. Yet the use of PPDs is itself a distinctive and significant rhetorical practice that merits attention not just because of what policies are changed, but because directives provide unique insights into the functioning of the presidency.

The Shaping of a Secret Genre

The earliest PPDs were issued by the Truman administration to direct executive agencies in keeping with the National Security Act of 1947 under the title of "National Security Council Intelligence Directives." The National Security Act of 1947 restructured the military, created the National Security Council and the Central Intelligence Agency, and by extension created a demand for executive action to direct the new agencies. In December 1947 Truman began issuing PPDs to direct the agencies associated with the National Security Council on how they ought to function. On December 12, Truman would issue the first three of what would amount to 13 PPDs, known contemporaneously as National Security Council Intelligence Directives (NSCID) outlining how the National Security Act would be implemented.

In these early directives Truman did not express much in the way of priorities or value judgements, but rather focused on explaining how the National Security Council (NSC) and the Central Intelligence Agency (CIA) ought to operate to satisfy the dictates of the National Security Act. These directives were not focused so much on outlining foreign policy positions or priorities, but rather dealt with how the infrastructure ought to operate. By way of example the first command in the first NSCID directive reads:

> To maintain the relationship essential to coordination between the Central Intelligence Agency and the intelligence organizations, an Intelligence Advisory Committee consisting of the Director of Central Intelligence, who shall be Chairman thereof, the Director, Federal Bureau of Investigation, and the respective intelligence chiefs from the Departments of State, Army, Navy, and Air Force, and from the Joint Staff (JCS), and the Atomic Energy Commission, or their representatives, shall be established to advise the Director of Central Intelligence. The Director of Central Intelligence will invite the chief, or his representative, of any other intelligence Agency having functions related to the national security to sit with the Intelligence Advisory Committee whenever matters within the purview of his Agency are to be discussed (1119-1120).[129]

To the extent that the Act created an essentially new branch of government housed under the executive branch it is no surprise that the Truman administration felt the need to clarify and focus on the mechanics of how that branch ought to work. For the Truman administration the directives were primarily used to articulate a chain of command and lay out the functions for agency heads that were created under the National Security Act. As such, the directives offer little in the way of guidance in understanding the interests of the President. The move toward a more direct engagement in foreign policy through PPDs began under the Eisenhower administration.

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[129] Truman, Harold. National Security Council Intelligence Directive 1, Issued Jan. 19, 1950. Accessed May 20, 2017. Web: https://history.state.gov/historicaldocuments/frus1945-50Intel/d432.

The Eisenhower administration issued over one hundred directives outlining U.S. foreign policy on a wide range of issues including diplomatic missions, missile defense, and the conduct of the Korean War. Under the Eisenhower administration the PPD (known contemporaneously as NSC papers) become the primary means through which foreign policy was formulated in the executive branch. In so doing, the Eisenhower administration expanded the use of PPDs to what has become their contemporary purpose, to articulate foreign policy goals and objectives to the agencies housed under the executive branch and the military. Despite this shared purpose, as time progressed different Presidents would give PPDs different titles and use them to different political ends, but the fundamental purpose would remain the same.

As they became normalized it developed certain institutional norms. The most notable of these was the use of "classification" to limit scrutiny of foreign policy. The practice of classifying documents so only the President and agency heads know that they have been issued and their content is a not an unreasonable practice to the extent that the United States faces legitimate security threats that requires ambiguity from foreign leaders and the public in foreign policy. That said, a byproduct of that effort is that PPDs are frequently outside of the public eye, and by extension not subject either to critique or democratic rebuttal. It is worth noting that even those documents analyzed here were mostly classified at the time of their release and in the case of the Obama administration some PPDs still remain classified at the time of this writing.

It is important when considering the function of PPDs to appreciate that the use of them to pursue foreign policy goals in secret is not new. Eisenhower used them to issue

direction on nuclear weapons policy. Kennedy in National Security Action Memorandum 28 issued on March 9, 1961 directed McGeorge Bundy to develop a plan for guerrilla warfare in Vietnam foreshadowing direct U.S. military involvement.[130] President Johnson issued National Security Action Memorandum 336 directing agencies to prevent potentially embarrassing activities in France,[131] which appears to be a reference to Operation Gladio, a covert CIA operation designed to infiltrate and undermine leftist organizations in allied countries.[132] Nixon issued National Security Decision Memorandum 17 to relax sanctions on China based on "broad foreign policy goals" three years before his famed trip to China and two years before Kissinger's secret trip.[133] In National Security Decision Memorandum 345 President Ford commanded the United States military to develop anti-satellite weapons without informing the public that the next war might well be fought in space.[134] In Presidential Directive 6, President Carter sought to normalize relations with Cuba through the use of exploratory talks; a policy congruent with but far more expansive than the more relaxed policy the early

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[130] Kennedy, John F. *National Security Action Memorandum No. 28 Guerilla Operations in Viet Minh-Territory*. Federation of American Scientists. Web. 20 May, 2017. https://fas.org/irp/offdocs/nsam-jfk/nsam28.jpg

[131] Johnson, Lyndon B. *National Security Action Memorandum No. 336 Potentially Embarrassing Activities Outside France Which are Controlled by France.* Federation of American Scientists. Web. 20 May, 2017. https://fas.org/irp/offdocs/nsam-lbj/nsam-336.htm

[132] In the memorandum no activities are specifically named, but the language in the directive infers an ongoing clandestine operation.

[133] Nixon, Richard F. *National Security Decision Memorandum No. 17 Relaxation of Economic Controls Against China*. Federation of American Scientists. Web. 20 May, 2017. https://fas.org/irp/offdocs/nsdm-nixon/nsdm-17.pdf

[134] Ford, Gerald. *National Security Decision Memorandum No. 345 U.S. Anti-Satellite Capabilities.* Federation of American Scientists. Web. 20 May, 2017. https://fas.org/irp/offdocs/nsdm-ford/nsdm-345.pdf

Carter administration adopted toward Cuba.[135] In National Security Directive 8 the President George H. W. Bush articulated a policy of ongoing support for the Nicaraguan rebels, a potential flashpoint for controversy given his involvement in the Iran Contra Scandal.[136]

In short, the PPD has emerged as a primary tool for Presidents to change foreign policy while skirting public scrutiny. To this day, because of the practice of classifying directives, many are unavailable. By the time George W. Bush took office this was already a well-established practice that did not require a persistent upkeep so much as prudential use. In understanding how the George W. Bush administration used directives the question is less about how the War on Terror was used to establish the power of the office, than it is about how the President sought to use that power to address the problem of terrorism in a novel manner. This is not to say that directives had not been used in previous military conflicts. Essentially every use of the military by a President since the Truman administration has been associated with the use of directives. Instead, it is a question of how the Bush and Obama administrations used directives as part of an effort to deal with broad military action in response to the problem of terrorism.

For both academic critics and the public, this norm toward classification works as a two-edged sword. On the one hand, absent a security clearance, many PPDs are inaccessible and may not even be known to exist unless they are leaked to the public. On the other hand, to the extent that those documents become public later, they provide a

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[135] Carter, James. *Presidential Directive/NSC-52 U.S. Policy To Cuba*. Federation of American Scientists. Web. 20 May, 2017. https://fas.org/irp/offdocs/pd/pd52.pdf.

[136] Bush, George H.W. *National Security Directive No. 8 U.S. Policy Toward Nicaragua and the Nicaraguan Resistance*. Federation of American Scientists. Web. 20 May, 2017. https://fas.org/irp/offdocs/nsd/nsd8.pdf.

peek into the internal discourses of the executive branch and represent the privately held views of the President. As such, they provide a rich discourse that can be analyzed to explain how Presidents lead the executive branch. An example of this use was analyzed by Lettow in his study of Reagan's nuclear weapons policy. As Lettow controversially argues, despite a public posture that strongly favored the development of the capabilities of the U.S. nuclear arsenal alongside strategic reductions in the size of the arsenal, Reagan and the executive branch secretly pursued a policy that sought to eliminate altogether offensive nuclear weapons capability (213-217).[137] As Lettow demonstrates in his analysis, PPDs provide a distinct view of U.S. foreign policy which is not reflected in the public discourse (55-56).[138]

There is a limit on the power of classification as a tool however. While classifying PPDs can shield Presidents from scrutiny while they are in office, ultimately they are subject to a declassification process. The process was initially outlined in Executive Order 12958 issued under the Clinton administration, which mandated the declassification of documents if there was "significant doubt" about the need for classification.[139] The George W. Bush administration maintained the practice, but restricted the standard for declassification in Executive Order 13952 by removing the wording of "significant doubt" about the need for classification. Ultimately both executive orders were revoked by the Obama administration in Executive Order 13526 which created the National Declassification Center and ordered the systematic

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[137] Vorbeck Lettow, Paul. *Ronald Reagan and His Quest To Abolish Nuclear Weapons*. (New York: Random House Trade Paperbacks, 2006), 213-217.
[138] Lettow, *Ronald Reagan and His Quest To Abolish Nuclear Weapons,* 55-56.
[139] Clinton, William J. *Executive Order 12958*, 17, Apr. 1995. Federation of American Scientists. Web. May 20, 2017. https://fas.org/sgp/clinton/eo12958.html

declassification of documents. The current standard is that documents are to be declassified after 10 years based on the judgment of the center and at 25 years automatically unless the documents pose a threat to security.

As a result of this trend towards retroactive declassification, Presidents no longer have the ability to avoid the scrutiny of history, even if they have the ability to avoid the scrutiny of public opinion. In the context of the directives issued in the terror wars, this means that there is a recent treasure trove of documents that are of great value to the public and to scholarship. Nonetheless, as will be demonstrated in the following section, both Presidents Bush and Obama made use of directives to secretly modify U.S. foreign policy in pursuing the terror wars as a means of avoiding public scrutiny.

Malleable Form

PPDs are notably malleable as a genre, in no small part because they have gone by a number of different titles. To make sense of them as a genre requires a sensitivity less to how they have evolved as a distinct set of practices that succeed because of repetition, than as an integral part of what is perceived to be the normal functioning of a presidency. The PPD is less a power claimed by Presidents outside of constitutional boundaries, than it is an attempt by Presidents to satisfy their policy aims by using an expansive interpretation of the power of the office. Because of the evolutionary process used to create more expansive powers that can be exercised through the PPD the norms that define their proper use are weaker.

The notion of a genre implies that particular expectations exist for how an office is performed and by extension how the documents issued by the office are crafted.

Typically these expectations give rise to a generic constraint, an expectation that a practice is performed in a similar way from one context to the next. As discussed in the previous section on signing statements, Presidents can do this through creating their own expectations by engaging in a repetitive practice reinforced by actions taken in executive agencies. In the context of PPDs the generic constraints do not arise from unilateral action taken by administrations to assert Presidential power, but rather from a public expectation that such power will be exercised based on the historic action taken by past presidents. Because the power afforded to Presidents to act on foreign policy matters is recognized, and the precedents for Presidential leadership on foreign policy exist, the PPD arises out of a perceived need rather than a specific grant of authority. As a result, it lacks the constitutional basis that implies the form that a PPD should take.

As a result of this context the PPD is a genre that is more malleable in how it is used than other documents. Genres of speech and writing are typically identified by similarity in the form they take; however, in the case of PPDs it is less a question of *how* the genre is formed than it is a question of *what* the genre is used to do. This distinction takes to heart the assertion in Campbell and Jamieson's work that the notion of genre is at its heart pragmatic.[140] By recognizing that a genre can be defined under a label while recognizing that its performances can be significantly divergent, the critic can provide a more nuanced appreciation of how specific exigencies are encountered by the diverse ideological commitments of presidents. In a sense, this approach inverts the perspective adopted by Campbell and Jamieson that focuses on how speeches operate as a discourse, minimizing the role of individual speeches in favor of appreciating the norms of the

[140] Campbell and Jameson, *Presidents Creating the Presidency: Deeds Done in Words*, 15-16.

genre.[141] In this chapter I endeavor to focus on the way specific exigencies in concert with ideological commitments create specific articulations that are divergent in form yet similar in function.

This approach is an attempt to reconcile the pragmatic sensibilities in Campbell and Jamieson's attempt to give an explanation of how the presidency operates through genres of speech with a criticism of how those genres were used to address a particular problem that has occupied 15 years of U.S. history. To provide a meaningful criticism of how Presidents have responded to that problem requires a greater appreciation for how particular exigencies make a genre function in a more malleable manner to respond to the perceived needs of the country. For this reason, rather than focusing on significant moments in the development of the genre, this criticism focuses on significant moments where the genre was used to make significant modifications to U.S. foreign policy.

Methodologically this approach was already foreshadowed in Campbell and Jamieson's delineation between form and genre. For Campbell and Jamieson a form represents a phenomena that when repeated can constitute a genre. Nonetheless, for Campbell and Jamieson, "The rhetorical forms that establish genres are stylistic and substantive responses to perceived situational demands."[142] Understood in this way genre functions to define a category, but it is the constituent forms and the demands that shape them that give rise to the possibility of a genre. Because PPDs are a response to a particular situational demand created by a foreign policy exigency, their response as a

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[141] Campbell and Jameson, *Presidents Creating the Presidency: Deeds Done in Words*, 15-16.
[142] Campbell and Jamieson, *Form and Genre: Shaping Rhetorical Action*, 15.

form figures more prominently than their formal function as a genre defined by the past decisions made by Presidents.

The notion of malleability in genre is foreshadowed in Carolyn Miller's argument that genre analysis is not merely the practice of creating taxonomies, but in identifying and describing social action.[143] Miller's argument is distinctive in that it does not seek to provide a single overarching correct way to taxonomize discourse, but instead seeks to use the notion of genre to describe how the actions carried out through language can constitute social change (151).[144] For Miller then genre is a categorical analysis that looks at the change resulting from speech rather than preoccupation with the form attached to that genre. As a result, a genre can contextually be defined based on the field of action without necessarily relying on the sort of characteristics used to create taxonomic genres.

My analysis expands on this notion by arguing that the notion of a genre refers to two distinct objects that have a complicated relationship to the question of what the significance of a genre is. The first object is the title, which is imposed on a set of speech practices by an external source. The second is the emergent set of forms that are repeated to constitute a genre. My analysis of PPDs concludes that they constitute a genre that is defined by its malleability both in the title and actions they take, yet by operating within the same field of political activity they are able to constitute a genre even if individual cases differ from each other in substantial ways.

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[143] Miller, "Genre as Social Action," 151.
[144] Miller, "Genre as Social Action," 151.

PPDs fit well into the description of a malleable genre, if for no other reason than their names have changed so many times. Under the Truman administration the early version of the PPD was known as the "National Security Council Intelligence Directive" and was written to direct the Central Intelligence Agency (CIA). This title would remain through the Ford administration even as the audience diversified to include the heads of all intelligence and foreign affairs agencies and other titles such as "National Security Study Memorandum" were used to refer to specific types of PPD. Under the Clinton administration the PPD was known as a "Presidential Decision Directive" and was understood as a document that the President would issue to any executive agency engaged in foreign affairs. Under the George W. Bush administration the PPD became known as either a "National Security Presidential Directive" (NSPD) or a "Homeland Security Policy Directive" (HSPD) representing a bifurcation of power and an emphasis on the power of the President to define the nature of foreign affairs and justify changing domestic policy as a part of that endeavor. Finally, the Obama administration provided the contemporary title for these documents, the Presidential Policy Directive (PPD).

That is not an exhaustive list of the titles used for PPDs. Rather, it is a sample of the titles that demonstrates how individual Presidents have attempted to place their own stamp on how these directives should be understood. As will be discussed later, this personal touch is apparent both in the language used as well as the ends to which these directives are put. For our purposes here, it is worth noting that the titles imply as much difference between these directives as their content does, yet they rely on the same source of legitimacy. Namely, the power of the office.

For a genre analysis that is informed by a focus on how individual actors and actions can shape the nature of a document the question of where the presumed legitimacy of the document arises from and the nature of that legitimacy is significant. As discussed above, without a clear constitutional basis, the President is nonetheless presumed to be the primary branch through which foreign policy decisions are reached. The result is that presidential foreign policy making is an endeavor defined more by how Presidents seize the initiative through their actions than by a standardized practice. In particular, the nature of the PPD reflects this vague authority because it is a genre of discourse that relies on power that is presumed, rather than argued for and defended in a manner that gives a sense of how Presidents understand the power of the office.

This is in contrast to signing statements, which as discussed in the previous chapter call on specific notions of how the presidency ought to function in order to give a veneer of legitimacy. This difference produces a discourse that is less dialogic and argumentative than it is a command form. Referring to them as "directives" is apt, in that they provide direction to the executive agencies on how to enact changes in policy or foreign affairs. As directives reliant on presumed power, they are remarkable in that they do not necessarily rely on precise descriptions of what actions ought to be taken, but also express the will of the President in terms of what values, priorities, and concerns will guide foreign policy.

A genre analysis here finds its greatest value in articulating how the Presidents have used the presumptive power of the office to place their own foreign policy perspectives into practice. In the context of the terror wars this means explaining how

Presidents George W. Bush and Barack Obama have understood the nature of the conflict(s) and what they sought to accomplish in responding to conflict during their time in office. PPDs, because they express opinions as well as giving direction provide a unique insight into how the power of the presidency is expressed not just in legal terms, but in terms of an institutional orientation to existing foreign policy concerns.

Inherent in such an analysis is the recognition that the power of directives stems from their ability to provide general direction to agency heads not only of the policy, but also the values and priorities in the policy. The crucial rhetorical means to accomplish this relies on the use of framing. As Kuypers describes, "Framing is a process whereby communicators, consciously or unconsciously, act to construct a point of view that encourages the facts of a given situation to be interpreted by others in a particular manner (8)."[145] The act of framing an issue is a distinctive strategy in that it relies on a degree of previous agreement between the rhetor and the audience to succeed. In an institutional context, such as the executive branch, this is significant because the threshold for accepting the frame is largely dependent on membership.

Because Presidents are able to select the leadership of the executive branch, they are largely able to select their audience for PPDs. Moreover, because directives are classified, the frames that the President selects are less likely to be subject to the same level of critique or scrutiny that might be found in a broader audience. A consequence of this reality is that Presidents do not rely on more expansive explanations of the politics or ideology behind those frames because those elements are amplified through the audience.

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[145] Kuypers, Jim A. *Bush's War: Media Bias and Justifications for War in a Terrorist Age.* (Lanham: Rowman & Littlefield Publishers Inc., 2006), 8.

The practice of framing in directives is therefore subtle in its articulation of an ideology, but is more explicit in trying to frame a problem in a manner that the ideology can respond to it.

What framing illuminates about genre is how strategy operates within the constraints created by norms. As Canel and Gurrionero note, "Framing is seen as a strategic action in a discursive form, because it involves strategic decisions on matters such as which frame to sponsor, how to sponsor it, and how to expand its appeal (134)."[146] What genre provides is a set of expectations or norms for Presidential action within the field delineated by the genre. A critique that focuses on the strategic use of framing within that field provides a better sense of what the significance of the actions taken within that field are as well as the motivations behind them. In the sections that follow, I articulate a critique that fuses these two critical insights to explain the strategic motivations in the frames used by Presidents in issuing directives within the executive branch.

Defining Conflict

The malleability of directives detracts from the ability to create a taxonomy for their uses because they can be used for such a diverse array of ends. Nonetheless, under both the Bush and Obama administrations there were recurring actions taken through directives that illuminate their significance and give a sense of how both Presidents pursued their foreign policies. The first of these efforts was defining conflict and, in particular, the terror wars. For both Presidents there were emergent problems that

[146] Canel, Maria Jose, & Gurrionero, Mario Garcia. "Framing analysis, dramatism and terrorism coverage: politician and press responses to the Madrid airport bombing," *Communication & Society* 29, No. 4, (2016): 134.

required changing the structure of the executive branch to address new challenges that needed to be defined. Because they allow Presidents to provide judgments and values alongside policy prescriptions directives were an important tool for this effort.

From the standpoint of using directives to set foreign policy goals in pursuing terrorism, the George W. Bush administration was not altogether unique in the use of PPDs. In Presidential Decision Directive 62 President Clinton issued a directive that largely predicted the emergence of a threat such as Al Qaeda, and declared a policy of disruption, pre-emptive attack, and rendition to address this threat.[147] It is tempting to infer then that the Clinton administration foreshadowed the same policies pursued by the George W. Bush administration. That inference is not entirely inaccurate, but it is also misleading. One of the central changes made by the George W. Bush administration was the creation of new agencies and new powers for those agencies that dramatically expanded the office. These changes in conjunction with the use of PPDs resulted in a significant and difficult to scrutinize evolution in the executive branch.

The George W. Bush administration inherited a tradition of delineating between PPDs based on whether the directive was ordering the creation of a study or the initiation of a policy. The first directive issued by the George W. Bush administration united both of these PPDs (known under the Clinton administration as "Presidential Review Directives" and "Presidential Decision Directives") under the title National Security Presidential Directive (NSPD). Bush described the NSPD as "an instrument for

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[147] Bush, George W. *Presidential Decision Directive/NSC-62 Protection Against Unconventional Threats to the Homeland and Americans Overseas*. Federation of American Scientists. Web. 20 May, 2017. https://fas.org/irp/offdocs/pdd/pdd-62.pdf.

communicating Presidential decisions about the national security policies of the United States (2)."[148]

The first NSPD (NSPD-1) was written, notably, on February 13, shortly after Bush took office and before the September 11 attacks that precipitated the War on Terror. NSPD-1 mostly dealt with organizational issues, effectively disbanding the existing sub-committee infrastructure in the NSC and reforming it. Noteworthy for our purposes, was the creation of a new sub-committee under the title of the National Security Council Policy Coordination Committee (NSC/PCC) for Counter-Terrorism and National Preparedness. This sub-committee was one of seventeen different sub-committees dealing with separate regions and elements of international affairs.

This subdivision of interests reflected an interest by the Bush administration in shaping a new infrastructure for the creation of foreign policy. The new sub-committee was not unique, but remarkable in that it was not headed by an agency official, but rather by the Assistant to the President for National Security Affairs. This decision allowed the President to avoid the complications that might arise from relying on a cabinet member responsible for overseeing an agency for which they might feel obligated to advocate. Instead, a personal assistant who only had allegiances to the President would provide a more direct line of communication with the sub-committee. This assistant was also afforded unilateral authority to create new NSC/PCCs as they saw fit. In delegating authority in this manner the Bush administration was able to simultaneously

[148] Bush, George W. "National Security Presidential Directive-1" Federation of American Scientists, http://fas.org/irp/offdocs/nspd/nspd-1.pdf.

bureaucratize and politicize the pursuit of terrorism by wedding institutional affiliation of the body responsible for addressing terrorism with the office of the President.

Alongside this change was the abolition of existing committees for interdepartmental communication. Instead, those responsibilities would be assumed by the NSC/PCCs responsible for either regional or policy concerns. The result of this rearranging was to streamline the flow of information and decision making so that there was less horizontal collaboration between the elements of the National Security Council in favor of a vertical movement of information and decision making power with the President at the pinnacle. This flow emphasized the role of the President as the unified decision maker about the direction of U.S. foreign policy rather than a bureaucratic approach emphasizing technical expertise found in the Clinton administration.

Subsequently, the NSPD became a frequently used tool by the George W. Bush administration. From a scholarly standpoint, the use of classification poses a significant barrier to understanding how these directives were intended to function. Absent from the public domain are a number of NSPDs which may have been passed shortly following September 11, 2001. That said, the first available NSPD following the September 11 attack, issued on October 25, speaks directly to the problem posed by terrorism.

In National Security Presidential Directive No. 9 (NSPD-9) George W. Bush attempted to outline the intentions and priorities for the United States in pursuing the War on Terror. NSPD-9, which was classified at the time it was issued, reads somewhat differently from earlier directives. Whereas previous directives from Bush were written in an essay style with only paragraph breaks to separate commands, NSPD-9 was written

with section headings that highlighted the function of different sections.[149] The result is a document that reads more like a departmental memorandum than previous directives.[150] As a result, rather than dictating specific actions for agencies to take, it functions as a normative judgement on the interests of the United States, and its aims in pursuing the War on Terror.

The first section, simply titled "Goal," states: "Eliminate terrorism as a threat to our way of life and to all nations that love freedom, including the elimination of all terrorist organizations, networks, finances, and their access to WMD[151](1)."[152] Read literally, this goal would envision the War on Terror as a war against all terrorism, in defense of all nations, in every possible sphere. Indeed, the War on Terror is more accurately defined as a "war on a tactic" than a war against a clearly defined enemy.[153] This broad goal is justified by similarly broad value claims, unexplained in the goals section, about the value of "our way of life" and "freedom". Read in this way, the War on Terror is understood as a particular mode of political change defined by its reliance on violence and fear which an audience could easily be persuaded to believe as objectionable.

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[149] This practice is not uncommon in directives, but is also far from universal. Where headings are used they do tend to connote either an important framing of the subsequent section or a dramatic change in topic that might confuse the reader. The George W. Bush administration tended to use them more frequently where the directive was intended to make normative judgements rather than issue specific commands.

[150] This is not altogether unique, PPDs under different Presidents were sometimes referred to and written like memorandums. Nonetheless, this is the first NSPD where this style was used.

[151] Weapons of Mass Destruction, typically defined as chemical, biological, or nuclear weapons.

[152] Bush, George W. *National Security Presidential Directive 9 Defeating the Terrorist Threat to the United States.* 25 October, 2001. Federation of American Scientists. Web. May 19, 2017. https://fas.org/irp/offdocs/nspd/nspd-9.pdf

[153] Worley, R. D. "Waging Ancient War: Limits on Preemptive Force. Strategic Studies Institute." February, 2003. Web. http://www.carlisle.army.mil/ssi/pubs/2003/ancient/ancient.html

In practice, of course, the terror wars have not been so broad, and the subsequent sections of NSPD-9 reflect this. The subsequent section, titled "Objectives" describes a more narrow effort. Three objectives are described. First, "As part of a broad and sustained campaign, respond forcefully to those who attacked the U.S. on September 11, 2001, and hold responsible those who harbor or support them (1)."[154] This objective presents itself as intuitive; indeed, it simply seems to be a modified version of the Authorization for the Use of Military Force Against the Terrorists that Congress had passed on September 14. Nonetheless, this is a much narrower goal than a war against a particular tactic or strategy.

The second objective is, "As a part of our overall strategy, defeat Al-Qaida and eliminate the threat from other terrorist groups that attack Americans or American interests (e.g., Hizbollah,[155] Hamas, Egyptian Islamic Jihad, Gamat)[156] (2)."[157] In this second objective the true scope of the War on Terror becomes clearer. The War on Terror is not so much a war only against those behind the September 11 attacks, but rather a war against a collection of organizations. A nuanced demonstration of the various similarities or differences of these organizations is not feasible or necessary for this project, although certain glaring similarities bear recognition. First, all of these organizations foreground an allegiance to a particular interpretation of Islam as a part of

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[154] Bush, George W. *National Security Presidential Directive 9 Defeating the Terrorist Threat to the United States.* 25 October, 2001. Federation of American Scientists. Web. May 19, 2017. https://fas.org/irp/offdocs/nspd/nspd-9.pdf

[155] Spelling in the original.

[156] Parenthetical in the original.

[157] Bush, George W. *National Security Presidential Directive 9 Defeating the Terrorist Threat to the United States.* 25 October, 2001. Federation of American Scientists. Web. May 19, 2017. https://fas.org/irp/offdocs/nspd/nspd-9.pdf

their ideology. Second, they are geographically similar in that all of these organizations, at that particular moment of time were based in various areas in the Middle East. This is not a small area, especially when one considers that the range of these organizations spans from Central Asia to North Africa with the acknowledgment that cells of these organizations exist in other parts of the world as well. Nonetheless, it is clear that the War on Terror was not aimed at a global war against a tactic, but rather against particular Islamic organizations that used that tactic.

The third objective is, "Convince, and if necessary compel, states and non-state entities to cease harboring, sponsoring, and providing safe-havens to such terrorists (2)."[158] This objective is illuminating, as it demonstrates the frame the Bush administration adopted when dealing with countries with potential ties to terrorist organizations. These countries are not perceived as sovereign in the traditional sense that they have a right to exercise control over territory and, therefore, must be persuaded through diplomatic means. This is evidenced by the decision to use "convince" rather than "persuade." That term implies that rather than the use of reason, force or other means of compulsion could be used to gain concurrence. In this framework, states must either freely submit to the will of the United States or be forced to submit. In this way, their sovereignty is an illusion, or at best a capricious condition afforded only by the allowance of the United States.

Taken as a whole these objectives paint a grim picture of a world divided. There is not just one country, but an entire section of the world that defies political and

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[158] Bush, George W. *National Security Presidential Directive 9 Defeating the Terrorist Threat to the United States.* 25 October, 2001. Federation of American Scientists. Web. May 19, 2017. https://fas.org/irp/offdocs/nspd/nspd-9.pdf

geographic boundaries which the United States perceives as a threat. This glimpse inside how the Bush administration perceived the world following the September 11 attacks (presuming that this view was not already held, itself a questionable position) lays bare the justification for the War on Terror. It is not just a war against a tactic that could be articulated as universally objectionable, or a war against a specific group who carried out attacks, it is a war against the Islamic countries and populations who could conceivably identify with those groups. At the same time a much narrower war, in the sense that it has certain geographic norms, and a broader war in the sense that it aligns the United States against a population that occupies a large political and geographic portion of the world.

This is not to say that the rhetoric of the Bush administration was explicitly Islamophobic. As Glenn Greenwald has noted, the Bush administration worked hard to delineate between the Islamic faith and Islamic extremism (6-7).[159] Despite the delineation that the Bush administration emphasized, the Manichean language of "good vs. evil" that Greenwald and other scholars have identified in the rhetoric of the Bush administration lends itself to broader applications. In this instance, defining the War on Terror exclusively in terms of conflict against Islamic groups lends credence to the perception that the War on Terror is a war specifically against organizations and countries claiming an affiliation with Islam.

The subsequent section is titled "Strategy." In this section Bush outlines in general terms how the War on Terror ought to be pursued. He outlines four principles

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[159] Greenwald, Glenn. *A Tragic Legacy: How a Good Vs. Evil Mentality Destroyed the Bush Presidency* (New York: Random House, 2007) 6-7.

that will guide how these objectives will be pursued. Reading these principles separately is constructive in that each illuminates how each of these principles foreshadows decisions made by the Bush administration. The first principle is "Adopt a comprehensive approach employing all instruments of national power and influence in a coordinated manner for a sustained national campaign against terrorism, including it's organizations, networks, finances, and access to WMD (2)."[160] This principle is telling because that it emphasizes a unified approach to the War on Terror defined by "national power and influence" in a "national campaign." The George W. Bush administration envisions its efforts less as a limited action to address a specific threat, than as an effort on all fronts to address an array of threats that can be lumped under the title of terrorism. More importantly, this effort flows through the executive branch in order to create unified action.

In this light, the efforts to sell the public on the War on Terror makes more sense, because the presidency viewed the War on Terror as an effort that required national unity as all elements of the country would be placed on a war footing. The aim described in NSPD-9 is the internal executive branch parallel to the effort to sell the U.S. public on an expansive War on Terror first articulated in Bush's address to the public on the night of September 11, 2001. As Kuyper's notes, the "War on Terror" from Bush's address to the nation on that evening until the beginning of U.S. strikes on October 6, 2001, functioned as a frame that gave the public a sense of meaning for both the attacks and the inevitable response. This frame defined the war in such expansive terms that the public would

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[160] Bush, George W. *National Security Presidential Directive 9 Defeating the Terrorist Threat to the United States.* 25 October, 2001. Federation of American Scientists. Web. May 19, 2017. https://fas.org/irp/offdocs/nspd/nspd-9.pdf

remain open to almost any action taken by the President (30-32).[161] NSPD-9 and, in particular, the first principle functions as a similar frame that defines the aims and powers of the President broadly to provide the greatest latitude of action.

The second principle was, "Pursue these objectives in coalitions with countries genuinely committed to this goal if possible, but act alone if necessary (2)."[162] This strategy foreshadows what would come to be known as the "Bush Doctrine" that a country may take unilateral preventive action in its own defense if there is a failure to gain international support. As Goodnight compellingly argues, the speech given by George W. Bush at West Point in 2002 provides a more fleshed out version of this argument that uses the moral, legal, and political precedents for self-defense to warrant a defense policy that emphasizes a willingness to act unilaterally (97-99).[163] Although NSPD-9 predates the Iraq War by two years, it provides a glimpse not just into the meetings where the possibility of an invasion of Iraq was raised (according to Peter Baker these meetings began on the afternoon of September 11),[164] but it foreshadows the development of a doctrine that would allow that war to take place.

Third, "Hold responsible any countries that harbor or support terrorists." The phrase "hold responsible" in this context is telling. As a legal term "responsible" has a legal connotation that "accountable" does not. Opting for the legalistic frame here implies a notion of justice that is clearly intended to be punitive. In this short statement

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[161] Kupyers, *Bush's War: Media Bias and Justifications for War in a Terrorist Age*, 30-32.
[162] Bush, George W. *National Security Presidential Directive 9 Defeating the Terrorist Threat to the United States.* 25 October, 2001. Federation of American Scientists. Web. May 19, 2017. https://fas.org/irp/offdocs/nspd/nspd-9.pdf
[163] Goodnight, Thomas G. "Strategic Doctrine, Debate, and Support for the Terror War." *Hitting First*. Ed. William Kelleher and Gordon Mitchell. (Pittsburgh: University of Pittsburgh Press, 2006), 97-99.
[164] Baker, Peter. *Days of Fire: Bush and Cheney in the White House*. (New York: Random House, 2006).

Bush is articulating a policy of retributive justice against countries that are implicated in state support of terrorism. This is not a strategy of diplomacy or engagement, but rather a policy defined by exacting punishment against countries involved. In this way, deterrence through retribution becomes the defining characteristic of the Bush presidency's approach to perceived potential threats.

Fourth, "In the context of this strategy, as highest priority, shall deprive terrorists and the countries that support them of access to WMD (2)."[165] It is difficult to ignore the grammatical error of an absent noun for the body tasked with "depriv(ing) terrorist and the countries that support them with WMD." Context does not help with divining which noun should be present, and the absence of one in a document of this significance is troubling given the potential ramifications of not knowing which body is responsible. Similarly, the decision to list the highest priority fourth seems somewhat incongruous.[166] Nonetheless, the thrust of this principle is clear. The Bush administration perceives the greatest threat to be terrorism in the context of WMD use. By prioritizing the denial of WMD to terrorists before other justifications for the use of the force, the Bush administration provides a presumptive justification for the use of force. This interpretation is validated by the simple fact that by the time the document was issued, the United States military was already engaged in Afghanistan.

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[165] Bush, George W. *National Security Presidential Directive 9 Defeating the Terrorist Threat to the United States.* 25 October, 2001. Federation of American Scientists. Web. May 19, 2017. https://fas.org/irp/offdocs/nspd/nspd-9.pdf

[166] One could argue that because this was an internal document, rather than a public declaration that less care was needed in the wording of the document. Such an argument of course ignores that these are directives for how agencies ought to act, and a failure to give clear direction, even if only because of grammatical errors, would be the height of irresponsibility.

Read together these strategic principles are telling. They operate around the notion that the use of force is not an option of last resort, but rather a primary means to pursue foreign policy objectives. This is a distinctly different orientation from the rhetoric expressed to the public, where military force was understood as an option of last resort. The difference between the internal document that articulates the priorities and strategies for pursuing foreign policy and the public understanding of those same priorities and strategies gives a better sense of the rhetorical demands faced by the George W. Bush administration. The Bush administration created a standard for entering conflict that was defined not by the aggression of a foreign country, but by the potential for aggression. This created a remarkable rhetorical demand for the Bush administration that foreshadowed important speeches and arguments that would be made in the lead up to the invasion of Iraq.

Because PPDs are internal documents addressed to the heads of executive agencies, the persuasive function of these documents addresses a narrower audience. Rather than persuading the agencies that these are the correct strategic goals and principles, the claims in the PPD function more like a command. The result of this difference in function is that there is an inevitable differentiation between the persuasive efforts directed at the public and those present in the directive. Nonetheless, the public is ultimately persuaded to support the goals outlined in the directive through the use of more traditional modes of public address. In this way, the attempts to outline strategic goals in the directive are a precursor to the attempts to persuade the public.

The Obama administration faced a different set of demands when it took office. In opting not to begin a major military incursion, the Obama administration did not have the same sort of opportunity to redefine the executive branch or set the terms for conflict that the Bush administration did. Nonetheless, the Obama administration did issue PPDs that would demonstrate a significant shift in the genre. A ready example of this shift can be found in the way the Obama administration dealt with cybersecurity.

The Presidential Policy Directives issued by the Obama administration work primarily through outlining the aims of the executive branch in policies that will affect the various executive agencies. As with George W. Bush and following the precedents set by previous Presidents, the first of Obama's "Presidential Policy Directives" (PPDs) was written to define the infrastructure for decision making on foreign policy issues in the executive branch. This first directive served two practical functions. First, it made clear that from this point forward directives would no longer be understood as National Security Presidential Directives (NSPDs), but instead as Presidential Policy Directives (PPDs). Although the Obama administration never offered a defense of this change, it could well have been intended to wed the NSPDs and HSPDs issued under the Bush administration into a single document. Second, it signaled who would be included on the National Security Council and how those agencies would communicate to each other.

An understanding of exigency is crucial to understanding how directives can be used to create a foreign policy infrastructure. To demonstrate the role of exigency it is worth looking in to a particularly significant directive issued by the Obama administration. PPD-20 "U.S. Cyber Operations Policy" was not the first directive to

address cyber space. The George W. Bush administration had issued a directive addressing the question that was both lengthy and thorough in delegating administrative responsibility. Yet what the Obama administration directive provides that is distinctive is an explanation of how directives can function on issues related to terrorism, but are not sutured to the concept of a threat specific to terrorism.

Traditional understandings of the term "exigency" rely on a notion of context that arises from a specific cause for speech, usually in response to a particular event. Where the George W. Bush administration had the September 11 attacks as an exigency for a foreign policy overhaul, the Obama administration lacked such a precipitating event. Instead, to justify an intervention the Obama administration had to rely on a slowly developing common sense that "cyber" threats presented such a substantial threat that action had to be taken, and the failure of Congress to act would be sufficient.

Which is exactly what Obama did. After Congress failed to pass The Cyber Security Act of 2012 in August, 2012, the Obama administration issued PPD-20. When released, PPD-20 was classified, and only became accessible to the public when Edward Snowden leaked the document as part of a larger package of documents, and it was subsequently published in *The Guardian*. The classified nature of PPD-20 and the controversial means by which it became available to the public are indicative of the potentially deleterious functions that it could serve. For rhetoricians concerned with how PPDs function as a genre, this document is telling in that even as the Obama administration attempted to shift away from terrorism as a term to describe a new threat that requires a new kind of response, cyber threats filled the gap, creating an exigency for

the use of directives and affirming the notion that as a genre directives rely on the perception of new problems to inaugurate large scale policy changes.

PPD-20 was predated by two directives intended to address the problems posed by cyber threats. The first directive to address cybersecurity was NSPD-38 issued by the George W. Bush administration on July 7, 2004. To this day NSPD-38 remains classified and locating a copy is next to impossible. That said, there was a public document released slightly over a year before NSPD-38 titled "The National Strategy to Secure Cyberspace" that ostensibly outlines the same principles and concerns that would be operationalized in NSPD-38. Notably while NSPD-38 remains classified, NSPD-54 "Cybersecurity Policy" addresses cyber security and cyberspace policy as well and was released four years later and has been declassified. What is interesting about these two Bush era directives is that because NSPD-38 is classified and the contents are relatively unknown, it is unclear whether NSPD-54 represents a substantial change in policy. Indeed, relative to other directives NSPD-54 is longer than most and is written in a manner that could conceivably be understood as intending to be comprehensive.

PPD-20 issued by the Obama administration was intended to supersede the (classified) NSPD-38 and complement the (unclassified) NSPD-54. That PPD-20 was a replacement directive indicates in some ways the function that NSPD-38 was intended to serve, but more importantly, demonstrates how the Obama administration conceived of the new threat posed by Cyberspace and conceived the need for a radical change in U.S. posture.

The first section of the document is dedicated to defining key terms that are important for understanding the minute influences on specific decisions. Although this is important, of greater significance for understanding how the Obama administration redeployed the directive genre to advocate for broad policy changes is the subsequent section. This section, titled "Purpose and Scope," speaks to both the nature of the threat and the function of the directive:

> The United States has an abiding interest in developing and maintaining use of cyberspace as an integral part of U.S. national capabilities to collect intelligence and to deter, deny, or defeat any adversary that seeks to harm U.S. national interests in peace, crisis, or war. Given the evolution in U.S. experience, policy, capabilities, and understanding of the cyber threat, and in information and communications technology, this directive establishes updated principles and processes as part of an overarching national cyber policy framework (4).[167]

The first paragraph begins with a statement explaining why the United States should be concerned with cyber space. As written, the first sentence argues that cyberspace and control of cyberspace is a critical component of the other foreign policy endeavors of the United States. Remarkably, rather than couching cyberspace as an area that poses a particular threat, the paragraph couches the need for a policy change in terms of a growth in capability and interest rather than in an emerging threat. Taken in this way, the directive is calling for a proactive and preventative strategy based on taking advantage of an innate superiority available to the United States in a particular realm.

The first principle outlined under this scope demonstrates the fundamental difference between the way the Obama administration understood its exigency for a policy change and the way the Bush administration understood the exigency for changing

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[167] Obama, Barack. *Presidential Policy Directive 20 U.S. Cyber Operations Policy.* Federation of American Scientists. Web. 18, May 2017. https://fas.org/irp/offdocs/ppd/ppd-20.pdf.

policy: "The United States Government shall conduct all cyber operations consistent with the U.S. Constitution and other applicable laws and policies of the United States, including Presidential orders and directives (4)."[168] The difference here is that although the Bush administration felt that the nature of the threat and cause for action required a new or at least modified understanding of the Constitution, the Obama administration viewed the cause for action as readily functioning within existing constitutional frameworks. In this way, the directive is not intended to upset an existing order, but rather to function within it.

A skeptic might hold that this change was less the result of a political difference between the Obama administration and the Bush administration than it was the Obama administration taking advantage of the norms created by the Bush administration. Such a reading is not without merit. Later in the "Scope and Purpose" section the directive is couched as affirming the status quo of the Bush administration of reserving extraordinary powers to address emergency conditions:

> The principles and requirements in this directive apply except as otherwise lawfully directed by the President. With the exception of the grant of authority to the Secretary of Defense to conduct Emergency Cyber Actions as provided below, nothing in this directive is intended to alter the existing authorities of, or grant new authorities to, any United States Government department or agency (including authorities to carry out operational activities), or supersede any existing coordination and approval processes, other than those of NSPD-38. Nothing in this directive is intended to limit or impair military commanders from using DCEO or OCEO specified in a military action approved by the President and previously coordinated and deconflicted as required by existing processes and this directive (4-5).[169]

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[168] Obama, Barack. *Presidential Policy Directive 20 U.S. Cyber Operations Policy.* Federation of American Scientists. Web. 18, May 2017. https://fas.org/irp/offdocs/ppd/ppd-20.pdf.

[169] Obama, Barack. *Presidential Policy Directive 20 U.S. Cyber Operations Policy.* Federation of American Scientists. Web. 18, May 2017. https://fas.org/irp/offdocs/ppd/ppd-20.pdf.

This paragraph implies that the directive does not change authority or reconfigure the infrastructure responsible for maintaining cyber security. Notably, the function of the agencies remains primarily the same.

Yet there are two significant changes named in this paragraph that are worthy of further interrogation. First, the Secretary of Defense is given the authority to conduct "Emergency Cyber Actions." This power is both new, and telling, because these actions are being conceived of as a military security function. Second, that the procedures of NSPD-38 are being fundamentally changed in a manner that NSPD-38 will be rendered out of date. Although absent the text of NSPD-38, it is difficult to determine what the nature of such changes might be, the decision to fundamentally overhaul the cyber security infrastructure by revoking NSPD-38 points toward the far reach that Obama envisions for the new policy.

When the directive turns to the question of "Emergency Cyber Actions," it is telling that the Obama administration gives the Department of Defense the authority to act unilaterally when it is "necessary to mitigate an imminent threat or ongoing attack using DCEO if circumstances at the time do not permit obtaining prior Presidential approval (10)."[170] Whereas the decision to use military action is usually the prerogative of the President, this directive turns that authority over to the Department of Defense when Presidential approval is not able to be attained in a timely manner.

There are two practical considerations that immediately present themselves in this section. First, in a massive attack, it is not outside the realm of possibility that

[170] Obama, Barack. *Presidential Policy Directive 20 U.S. Cyber Operations Policy.* Federation of American Scientists. Web. 18, May 2017. https://fas.org/irp/offdocs/ppd/ppd-20.pdf.

communications equipment could be inoperable and the Department of Defense might be out of contact with the President. Second, that a timely response may not afford the time required for Presidential approval. In either case, the section delegates the decision over whether such conditions exist based on a set of explicit criteria that would be applied by the head of the department or agency concerned in the event. Understanding these criteria makes clear how the Obama administration reconceived the role of the President.

The criteria are described as a set of conditions which must all be present in order for the department or agency to take unilateral action. The first of these criteria is:

> An emergency action is necessary in accordance with the United States inherent right of self-defense as recognized in international law to prevent imminent loss of life or significant damage with enduring national impact on the Primary Mission Essential Functions of the United States Government, U.S. critical infrastructure and key resources, or the mission of U.S. military forces (10);[171]

What is interesting about these criteria is that they emphasize the role of international law in determining whether or not there is a need for a response. Where the George W. Bush administration might well have framed the issue in terms of national security defined by a nationalistic vision of sovereignty, the Obama administration focuses on a right to self-defense recognized in international law. This represents a shift toward viewing sovereignty as an international concept that is less tied to nationalism than to a universally recognized right of statehood. This same shift can be found in the way prevention as a term is used in this particular criteria. Rather than using prevention as a justification for unilateral action to prevent or deter an emerging threat, the term prevention is used to designate a particular negative effect that could arise during an

[171] Obama, Barack. *Presidential Policy Directive 20 U.S. Cyber Operations Policy.* Federation of American Scientists. Web. 18, May 2017. https://fas.org/irp/offdocs/ppd/ppd-20.pdf.

attack. Prevention then does not afford an offensive capability to prevent a potential threat, but rather is a basis for unilateral intervention by a department or agency into an ongoing attack that has a particular threat profile. In short, what this criterion signifies is a shift from unilateral action by the presidency based on nationalistic visions of security toward unilateral action by department heads to respond to mature threats that carry a particularly significant risk defined by international understandings of statehood.

The second criterion functions in a similar manner. In giving power to the department or agency to make a decision over the use of force, the second criteria enacts a shift in sovereignty, "Network defense or law enforcement would be insufficient or unavailable in the necessary timeframe, and other previously approved activities would not be more appropriate"[172] indicates that the agency or department head is empowered to make a decision over whether the normal functioning of law must be suspended to respond to a specific threat. In short, the head of an agency is empowered to make decisions regarding the state of exception. This points towards the inevitable dilemma in liberal democracy that it is ultimately only sustainable until it is faced with a significant threat, at which point it gives way towards a less democratic, in this case, a more bureaucratic form of governance that limits accountability in favor of a more rapid response.

Yet the agency or department head does not have a free hand in determining the size or nature of the response. As the second criteria specifies, "The Emergency Cyber Actions will be conducted in a manner intended to be nonlethal in purpose, action, and

[172] Obama, Barack. *Presidential Policy Directive 20 U.S. Cyber Operations Policy.* Federation of American Scientists. Web. 18, May 2017. https://fas.org/irp/offdocs/ppd/ppd-20.pdf.

consequence; The Emergency Cyber Actions will be limited in magnitude, scope, and duration to that level of activity necessary to mitigate the threat or attack."[173] So although the agency or department head has the authority to respond to an attack, they lack the authority to carry out a response that uses deadly force or initiates an extended engagement that would go beyond the scope of the threat. Thus, there is a strict limitation both on the power given to agency or department heads so that the exception declared is not permanent but rather contingently tied to the threat. There is the possibility for malfeasance under these criteria, but it is a distinctly different kind of malfeasance possible than that found in a situation where the sovereign has unlimited power. More to the point, the directive is limited to the structure defined by constitutional democracy for dealing with contingent circumstances, but also attempts to create limitations on the scope of the action which can be taken. The structural form of an exception remains, but the nature of the exception is a ruffle rather than a break in the constitutional system.

This notion of limited decision-making power appears in the last criterion, following a clause that emphasizes practicable coordination with other agencies, the directive creates a further limit on the decision-making power given to agency or department heads: "The Emergency Cyber Actions are consistent with the U.S. Constitution and other applicable laws and policies of the United States, including Presidential orders and directives."[174] This clause is important in that it places the

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[173] Obama, Barack. *Presidential Policy Directive 20 U.S. Cyber Operations Policy.* Federation of American Scientists. Web. 18, May 2017. https://fas.org/irp/offdocs/ppd/ppd-20.pdf.

[174] Obama, Barack. *Presidential Policy Directive 20 U.S. Cyber Operations Policy.* Federation of American Scientists. Web. 18, May 2017. https://fas.org/irp/offdocs/ppd/ppd-20.pdf.

decision-making power of the agency or department head in line with the Constitution rather than in opposition to it. This shift back toward the Constitution frames the action to be taken by an agency or department head. It must be congruent with the existing powers of the executive branch. Although those powers are expansively defined under the George W. Bush administration, and that expansive definition is not necessarily modified here, the deference to the document itself rather than the theoretical interpretation offered by the Bush administration points toward a more constrained version of the executive branch.

Although there is admittedly more to be said about this particular directive, for the purposes of understanding its function, and how it demonstrates a shift in the genre from the use of directives under the George W. Bush administration, this section is sufficient. Where the George W. Bush administration attempted to center power in the executive branch, and specifically the office of the President, the Obama administration diffused that power in subtle but significant ways. First, it sought to situate the power of the United States in relation to international law defined by preventive force against imminent attack rather than preventive force against potential threat. Second, it dispersed that power in a very limited way to the heads of agencies and departments housed under the executive branch. Third, it brought the Constitution back into the determination about the power of the executive branch as a constraint on power rather than as a basis for expanding power.

Working within the genre of the directive, which is fundamentally malleable and used to make normative judgments about the orientation of the executive branch, the

Obama administration used PPD-20 to diffuse sovereign decision-making power in the specific case of cyberwarfare. The justification for policy changes described by the Obama administration were the same as those used by the previous administration, but were put to a distinctly different purpose.

A compelling argument could be made that the analogy between taking action on cyber terrorism and the terror wars is not a perfect one. Yet this argument only problematizes the comparisons of content, rather than its form. Of the available directives issued by the Obama administration none deal directly with the terror wars. To make sense of how the genre functions to define a policy and the normative judgments which guide it requires comparing directives that serve a similar purpose. Working around the inherent problems posed by classification of directives and the shift in the use of directives by the Obama administration, the best analogy is between Obama's policy on cyber terror and George W. Bush's terror wars.

This analogy works because both Presidents perceived a distinct emerging threat that they had to address. To do so, both Presidents used directives to unilaterally shape new policies that determined the direction of U.S. policy in significant ways. For Obama it was a new threat created by technological innovation that prompted him to reconfigure the executive branch so that decision making became more diffuse if not more democratic. For Bush it was a newly perceived threat signified by the most destructive terrorist incident to take place in the United States, which prompted him to centralize the power of the executive branch in the office of the President.

The significant difference in their approaches is that the Obama administration chose a narrower approach, less reliant on selling the public on expansive action that required not only the use of military force and reconfiguration of the government. Instead, Obama focused on framing the concerns and values inherent in improving cybersecurity within a constitutional framework that was already in place. By contrast, the George W. Bush administration sought to expand the power of the executive branch to become commensurate with the perceived threat. In general, the Obama administration did accrue some benefit from the power claimed by the Bush administration, but the Obama administration was not reliant on those powers in the same way.

The efforts by the Obama administration point towards a constitutional vision that separated the nature of the threat from the need for institutional reorganization that was lacking in the Bush administration. In so doing, the Obama administration was able to articulate a vision of the presidency that operated within existing constitutional coordinates, rather than seeking to alter the constitutional understandings of the public. The result is a presidency that is able to take bold and expansive action, which is arguably problematic, but maintains the standards by which its critics can evaluate the actions of the President.

Developing a Strategy

Beyond defining the scope of a conflict and creating the necessary infrastructure to pursue it, both Presidents George W. Bush and Obama needed to develop a strategy for pursuing those conflicts. Both Presidents viewed directives as the ideal solution to the

difficult problem of articulating to the agencies under their control how the terror wars ought to be conducted. In both cases, the directives functioned as a way to make sense of how the problems facing their administrations could be dealt with holistically, rather than as a collection of disparate policies. What would separate these Presidents was where terrorism fit into the formulation of the strategy. For the Bush administration this meant developing a strategy built around the dominant frame of terrorism. For the Obama administration this meant breaking this larger frame apart to develop distinct policies to deal with more specific threats. In both cases, directives provided a powerful tool for articulating the strategies inherent in both of these approaches to the terror wars.

The most well-known, and controversial NSPD issued by the George W. Bush administration is commonly confused with the National Security Strategy (NSS) 2002. The reporting on NSS 2002 ironically led to some complications in how the public understood the document, in no small part because of the highly classified nature of some of the source material. Unpacking this history demonstrates the problem with the differences between an internal definition of strategy and public persuasion to support that strategy.

NSS 2002 is a document that is periodically distributed to Congress as required by the Goldwater Nichols Act. The NSS 2002 was released on September 17, 2002, slightly over a year after the September 11 attacks. Three days previously NSPD-17 was issued in a modified and unclassified form as Homeland Security Policy Directive (HSPD)-4 on December 11, 2002. On September 20, 2002, the New York Times ran a story that contained the full text of the NSS 2002 as a document that would be given to

Congress as a statement of the position of the Bush administration on security strategy. NSPD-17, by contrast, was internal and directed to the heads of executive agencies (and the original version remains classified to this day). Although the entire text of the original NSPD-17 has never been published, excerpts were published on January 31, 2003, in the Washington Times, in an article titled "Bush Approves Nuclear Response." Rather than including then (or at any later date) the entire text of NSPD-17, the article selected an excerpt from NSPD-17 that indicated that President George W. Bush believed the U.S. had the right to use nuclear weapons as a response to attacks against their allies. Although this was not a recognizable shift in doctrine, it was different in that it asserted a position for the United States on the use of nuclear weapons, rather than the deliberately ambiguous position adopted by earlier Presidents. As a result, it gave the erroneous impression that Bush's "approval" of the use of nuclear weapons was a change in force posture from preceding Presidents.

Despite the significant role that NSPD-17 played in defining U.S. foreign policy, a combination of classification, releases of parallel documents to Congress, and misleading reporting has muddied the function of this document such that even though it outlined a massive part of the strategy and policy used in the terror wars it was nearly impossible to contextualize. Isolating this document into its original context defined both by exigency and audience allows for a distinct understanding of how that document defined U.S. foreign policy at the outset of the terror wars. It also allows a reading of the document that illustrates what was at stake in weak reporting on the document at the

time. The reporting contributed to the conflation of the terror wars with a strategy for addressing WMD.

The text that exists in the public domain is the declassified text of HSPD-4. This declassified text actually belongs to a slightly different class of document, known as a Homeland Security Policy Directive (HSPD), which served the same function, but was distinguished from the NSPD by the focus on foreign affairs that impacted homeland defense. The distinction itself is not particularly important in this case, other than to say that the release of HSPD-4 as the declassified version of NSPD-17 was different, but the extent to which they were different is difficult to ascertain, as only the declassified version is available to the public. The only difference that has been described in the public domain comes from the January 31, 2003, Washington Times article described above.

With the caveat that NSPD-17 as it was distributed to its intended audience has not been made available to the public, the document nonetheless has significant utility as an object of analysis because it demonstrates in general how the Bush administration viewed a significant part of the terror wars because it addresses one of the major justifications provided for the invasion of Iraq as a part of the terror wars. NSPD-17 (hereafter referred as the declassified version HSPD-4) is titled "National Strategy to Combat Weapons of Mass Destruction." The title itself is telling, as the introduction to the document, taken from the NSS 2002, states: "The gravest danger our Nation faces lies at the crossroads of radicalism and technology. Our enemies have openly declared that they are seeking weapons of mass destruction, and evidence indicates that they are doing

so with determination (4)."[175] Although the enemy is not defined, the reference to radicalism makes it clear that the concern is primarily the possibility that terrorist organizations like Al Qaeda might seek to use these weapons.

Having a national security strategy that is designed to address a threat posed by a specific type of weapon in the hands of a specific group seems on its face redundant when one considers that there is a national security strategy designed to deal with that group. Yet what one must consider is that for the George W. Bush administration, the threat posed by Al Qaeda was an emerging threat. Indeed, it is hard to find a reference to the fact that the same organization had carried out an attack against the World Trade Center in 1993, a scant eight years earlier in the rhetoric of George W. Bush or other members of the administration. With that in mind, the development of a strategy to combat an apparently emerging threat makes some sense. However, as will be demonstrated, the perception of the particular threat posed by Weapons of Mass Destruction (WMD) in the hands of a particular organization (or a collection of likeminded organizations) was used as a justification for the creation of a broader definition of threats.

HSPD-4 is an important document in that it links a strategy for combatting WMDs with the overarching strategy to combat terrorism. As stated in the introduction, "An effective strategy for countering WMD, including their use and further proliferation is an integral component of the National Security Strategy of the United States of America. As with the war on terrorism, our strategy for homeland security, and our new

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[175] *National Security Strategy of the United States 2002*. September 2002. U.S. Department of State. Web. 14 May, 2017. https://www.state.gov/documents/organization/63562.pdf

concept of deterrence, the U.S. approach to combat WMD represents a fundamental change from the past (para. 2)."[176] In this attempt to link the War on Terror to the threat posed by WMD the administration is relying on analogical reasoning. Because the threat posed by terrorism has fundamentally changed (with the nature of that change unstated), creating a need for a new policy, the nature of the WMD threat has also changed (again with the nature of the change unstated), the need for a new strategy to combat terrorism has been created. The crucial point in this analogy is that the change in these different areas of foreign policy is simultaneous, creating an enthymematic presumption that the cause is the same; that the emergence of new organizations that pose threats is innately tied to the expansion of the WMD threat, because they are different facets of the same problem.

The introduction frames the problem posed by weapons of mass destruction as intuitively a security problem. The notion of security itself here implies both a sense of safety from harm caused by WMDs, but also "freedom from coercion or intimidation" threated by foreign ownership of WMDs. In this sense, security is tied to two distinct narratives. The first, already present in other directives, deals with the question of sovereignty. In this instance, the security of the United States supersedes the sovereignty of foreign countries who would otherwise choose to pursue the development of WMD as a means of self-defense. This subordination of the sovereignty of other countries lays the groundwork for interventionist wars because the typical barrier to such intervention

[176] Bush, George W. *NSPD-17/HSPD-4 National Strategy To Combat Weapons of Mass Destruction*. 17 September, 2002. Federation of American Scientists. Web. 16 May, 2017. https://fas.org/irp/offdocs/nspd/nspd-17.html

recognized both in international law and traditional norms surrounding conflict stemming from the right to self-determination is minimized.

The second narrative stems from understandings of freedom and American exceptionalism that expands the justification for an aggressive foreign policy to an ontological level by arguing that the threat posed by WMDs includes threats to a particular way of life. Embedded within the claim to freedom from coercion and intimidation is the rejection of an imposition on the values and beliefs held by the United States government and people. Indeed, it is a rejection of the possibility that other countries could change the way U.S. officials and citizens perform their day-to-day affairs. As Greenwald argues, such a broad rejection of impositions tends to cast opposition as an absolute evil (103-104).[177] To take this analysis one step further, the Bush administration's emphasis on values created an independent justification for conflict that stemmed from the defense of values as a matter of security that went beyond the maintenance of life but also included the way in which that life could be lived. This rhetoric conjures up images not just of U.S. citizens living safely, but also preserving a standard of living that can only be enjoyed in a world where the possibility of a threat to safety is non-existent.

The recurring appeal throughout HSPD-4 is linking the possession of WMD by states to the possibility of terrorists using them. This strategy frames the WMD threat in a manner that lends itself to strategies of conflation and exaggeration that minimizes differences between threats and magnifies the nature of the threat to justify more aggressive and interventionist foreign policy approaches. The public manifestation of

[177] Greenwald, *Tragic Legacy How a Good Vs. Evil Mentality Destroyed the Bush Presidency*, 103-104.

this mode of thought was found in Colin Powell's speech before the United Nations on February 5, 2003. In this speech, as Zarefsky argues, Powell was forced to focus primarily on the discussion of WMD because that was the only argument likely to succeed in persuading members, if not the organization, of the United Nations to support intervention (282).[178] Yet for the U.S. public the linkage of Iraq's possession of WMD with support for Al Qaeda was more persuasive, even if the evidence was weak (295-296).[179] Ultimately, although the international community remained skeptical, the specific confluence of these perceived threats prompted support from the U.S. public.

Following the introduction, HSPD-4 lists 3 pillars of national security: Counterproliferation, Nonproliferation, and WMD Consequence Management. Each of these pillars constitutes its own section in the HSPD-4 with subsections explaining how the administration intended the executive agencies to contribute to those pillars. In this structure the architectural metaphor implied by in the term "pillar" is significant. The administration views the foreign policy pillars as independent supports for a broader structure that supports the vision of security outlined in the introduction. The individual pillars are girders for a vision of security that is not only physical, but also includes the freedom to freely pursue other foreign policy objectives.

The section regarding counterproliferation breaks substantial new ground in U.S. foreign policy, primarily because it breaks with historical norms in essential foreign policy concepts. Foremost among these is the use of strategic ambiguity to increase the deterrent capacity of the United States. An example of this is the controversial

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[178] Zarefsky, David. "Making the Case for War: Colin Powell at the United Nations," *Rhetoric and Public Affairs* 10, No. 2, (2007): 282.
[179] Zarefsky, "Making the Case for War: Colin Powell at the United Nations," 295-296.

modification highlighted in the Washington Times reporting. In the declassified version, HSPD-4 holds:

> Today's threats are far more diverse and less predictable than those of the past. States hostile to the United States and to our friends and allies have demonstrated their willingness to take high risks to achieve their goals, and are aggressively pursuing WMD and their means of delivery as critical tools in this effort. As a consequence, we require new methods of deterrence. A strong declaratory policy and effective military forces are essential elements of our contemporary deterrent posture, along with the full range of political tools to persuade potential adversaries not to seek or use WMD. The United States will continue to make clear that it reserves the right to respond with overwhelming force including through resort to all of our options to the use of WMD against the United States, our forces abroad, and friends and allies (para. 12).[180]

The significant change in the Washington Times reporting is in the last sentence. In their reporting the classified version of the document substitutes "including potentially nuclear weapons" for "including through resort to all of our options." This change is significant, as it foregrounds the ability to use nuclear weapons. In the broader context of this section, the classified version foregrounds nuclear weapons in the context of a strong declaratory policy.

Such a policy is a major departure from the existing approach to deterrence, which relies on the possession of a large nuclear arsenal combined with deliberate ambiguity on the guidelines for the use of that arsenal including the possibility of initiating a first strike. The premise behind this ambiguity is that it balances between avoiding a commitment trap where the United States might find itself compelled to use its arsenal and retaining the ability to use it if such a need should arise. By remaining

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[180] Bush, George W. *NSPD-17/HSPD-4 National Strategy To Combat Weapons of Mass Destruction*. 17 September, 2002. Federation of American Scientists. Web. 16 May, 2017. https://fas.org/irp/offdocs/nspd/nspd-17.html

ambiguous in its nuclear posture the United States is able to avoid pressure to use its arsenal to maintain the credibility of the deterrent when the use of that arsenal would be detrimental to the security interests of the United States. In adopting a stronger declaratory posture, the George W. Bush administration was gambling that a greater assurance that the arsenal would in fact be used created a stronger deterrent against potential adversaries seeking to use WMDs.

This gambit speaks volumes on how the George W. Bush administration understood the function of the President in relation to foreign affairs. As discussed above, the justification for centering control over foreign policy in the executive branch is because doing so has developed as a constitutional and international norm. Embedded in that norm is the sense that the executive branch effectively functions as the voice of the country. In this directive, Bush is informing the executive agencies that he will take this norm to its logical extreme, by taking advantage of the role as national voice the President will also use the voice of the President to pursue policy. In a previous eras speeches from Presidents had the power to change the world by shifting public opinion abroad. In the contemporary era, when a pillar of U.S. foreign policy is defined by the declaring the intent to use nuclear weapons as a deterrent, the words of the President are sufficient to inaugurate the policy.

Of equal import is the section on counter-proliferation dedicated to "Defense and Mitigation." In this section, the United States commits itself to developing a missile defense system that can counter WMD threats. In this particular instance, the WMD threat would almost certainly be nuclear, and the concern would assuredly be an

intercontinental missile. What is disconcerting here is that traditional deterrence theory relied on the lack of an ability to defend against such a missile in order to preserve parity between competing nuclear powers. If one country developed an effective counter measure, such as an Anti-Ballistic Missile (ABM), they would have the ability to strike without fear of reprisal, and the prospect of mutually assured destruction that deterred both countries from striking would collapse. This concept was enshrined in the Anti-Ballistic Missile Treaty between Russia and the United States, which prevented both countries from developing missiles capable of intercepting an inbound nuclear tipped missile. The decision to pursue a missile defense represents a thorough rejection of the concept of parity that undergirded Cold War notions of deterrence in favor of a new concept rooted in a vision of security through the judicious use of force.

Of note is that this particular position was made into policy shortly thereafter. On December 13, 2001, the United States indicated to Russia that it would be withdrawing from the ABM treaty. After the six-month waiting period mandated in the treaty, it was dissolved, and the United States created a new agency to oversee the development of a missile defense system. With this shift, the concept of deterrence was completely overhauled. Although the likelihood of the organizations targeted in the terror wars gaining access to and using an intercontinental missile are relatively small and, therefore, not likely to be the subject of this particular provision, this provision has value for understanding the terror wars. As described in the analysis of the introduction to the document, the Bush administration saw these as parallel problems defined by the changing nature of threats and the need for a more robust posture and defense against the

use of nuclear weapons. Understood in this context, the George W. Bush administration was not merely updating or tinkering with the existing concepts that guide foreign policy, it was attempting a complete overhaul of U.S. foreign policy.

The second pillar is titled "Nonproliferation." This title, on its face apparently a synonym for counterproliferation, has a distinct and important meaning. Nonproliferation refers to an array of policies designed to prevent especially horizontal proliferation (the development of WMD by states that previously had no arsenal) and specifically refers to the non-proliferation regime created by the Non-Proliferation Treaty (NPT). Counterproliferation by contrast refers to a set of policies designed to deter and mitigate the effectiveness of proliferation by developing military and political countermeasures to the effectiveness of such a policy. The significant difference between nonproliferation and counterproliferation is the emphasis placed on diplomatic and treaty based efforts inherent in a nonproliferation policy that are aimed at reducing the likelihood that other states would be interested in developing a nuclear weapons arsenal.

The sticking point in this section is the emphasis in the first paragraph placed on the use of military force. As the NSPD states:

> We will hold countries responsible for complying with their commitments. In addition, we will continue to build coalitions to support our efforts, as well as to seek their increased support for nonproliferation and threat reduction cooperation programs. However, should our wide ranging nonproliferation efforts fail, we must have available the full range of operational capabilities necessary to defend against the possible employment of WMD (para. 18). [181]

[181] Bush, George W. *NSPD-17/HSPD-4 National Strategy To Combat Weapons of Mass Destruction*. 17 September, 2002. Federation of American Scientists. Web. 16 May, 2017. https://fas.org/irp/offdocs/nspd/nspd-17.html

In this context, the justifications offered before the United Nations for the invasion of Iraq make sense. Although the argument that Iraq was sponsoring or supporting terrorism appears weak, the justification for invasion with a coalition force, based on the failure by Iraq to comply with commitments to nonproliferation, is in keeping with the nonproliferation policy of the United States. Although the public remained unaware of the strict nature of the United States interpretation of nonproliferation, the administration had shifted to a policy where the failure on the part of other countries to comply was sufficient justification to engender a military response.

This demonstrates an important distinction between the internal and external rhetoric of the Bush administration. As Corn and Isikoff have noted, in selling the Iraq War the Bush administration especially in the immediate lead up to the war, emphasized the particular dangers posed by Saddam Hussein as a leader. In particular the 2003 State of the Union address contained no evidence of attempts to develop WMD by the Iraqi government or support for terrorist groups. Instead, hypothetical language was used to create a sense that Saddam was the type of leader who would engage in such evil and must be stopped (172-173).[182] The private rhetoric of the Bush administration exemplified in HSPD-4 in fact created a much broader standard, namely, that any country pursuing such weapons posed a threat that the United States could legitimately deal with militarily. This standard is at the same time too narrow and too broad to be included in the public discourse. It was too narrow in the sense that the Bush administration lacked the conclusive evidence necessary to meet it, and too broad in the sense that a number of

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[182] Corn, David and Isikoff, Michael. *Hubris: The Inside Story of Spin, Scandal, and the Selling of the Iraq War*. (Cuba: Three Rivers Press, 2007) 172-173.

other nations would have more readily fit the standard set by the George W. Bush administration.

The last pillar is "WMD Consequence Management." This section, without substantive policy direction beyond naming the White House Office of Homeland Security as the body responsible for responding to a "WMD event," speaks to the need for a response to WMD threats. Still, the inclusion of this pillar is significant. Although the text of this section leaves the work of formulating a policy to the OHS, it nonetheless demonstrates that the Bush administration was not merely using the threat as a pretense for action, but felt the need to prepare for the worst case scenario.

In the absence of much in the way of direction, this statement instead functions as a value claim, designed to frame the threat posed by WMD and the need for the government to adequately respond to an attack. Rather than discussing the possibility of a threat from an intercontinental missile, or an attack by another country, the directive singles out the problems posed by a terrorist attack as a point of emphasis. The final paragraph of the section holds:

> The National Security Council's Office of Combating Terrorism coordinates and helps improve U. S. efforts to respond to and manage the recovery from terrorist attacks outside the United States. In cooperation with the Office of Combating Terrorism, the Department of State coordinates interagency efforts to work with our friends and allies to develop their own emergency preparedness and consequence management capabilities (para. 36).[183]

The inclusion of this section in a directive that deals exclusively with WMDs is telling. The threat perceived by the George W. Bush administration is less the use of WMDs by

[183] Bush, George W. *NSPD-17/HSPD-4 National Strategy To Combat Weapons of Mass Destruction*. 17 September, 2002. Federation of American Scientists. Web. 16 May, 2017. https://fas.org/irp/offdocs/nspd/nspd-17.html

another country, and more the possibility that the U.S. could experience an attack from a terrorist organization. In context, such a concern is not unreasonable. The experience of the September 11 attacks would certainly influence how the administration perceived the possibility of a threat. At the same time, the decision to single out terrorism as the most specific threat vector in a document addressing WMD threats is surprising because the use of such weapons by a terrorist organizations is nearly unprecedented, and the evidence that such a threat was developing or present was absent from the document and lacking in the historical record. As Daalder and Lindsay note, the threats described to President Bush that prompted a concern over terrorist use of WMD constituted an incomplete picture, with no definitive evidence that prompted a reaction to a threat which had yet to emerge (118-119).[184]

The conclusion of NSPD-17/HSPD-4 repeats the same technique, in calling for a unified response to the perceived threat created by WMD proliferation. In the context of the broader problem of proliferation, terrorism is couched as a particular threat demonstrating the fundamental problem of weapons development by countries or non-state actors perceived as hostile to the United States. What is lacking in this directive, indeed in the limited thought that inspired it, is an honest accounting of what evidence is available to justify defending such a policy. In the case of this directive it is clear that there is no specific evidence to validate the existence of a threat posed by terrorist use of WMDs, or for that matter, the use of WMDs by any state. The directive relies on the empirically validated threat of terrorist attacks (as evidenced by the attacks on September

[184] Daalder, Ivo H. and Lindsay, James M. *American Unbound: The Bush Revolution in Foreign Policy*. (Washington D.C.: Brookings Institution Press, 2003) 118-119.

11), yet it presumes that the nature of the weapons used does not provide empirical evidence about the nature of the threat.

This is perhaps best evidenced in the last paragraph of the conclusion, which identifies WMD terrorism as a distinct variety of threat based on the relationship between state sponsors of terrorism and terrorist organizations:

> One of the most difficult challenges we face is to prevent, deter, and defend against the acquisition and use of WMD by terrorist groups. The current and potential future linkages between terrorist groups and state sponsors of terrorism are particularly dangerous and require priority attention. The full range of counterproliferation, nonproliferation, and consequence management measures must be brought to bear against the WMD terrorist threat, just as they are against states of greatest proliferation concern (43).[185]

In this paragraph a known relationship, the existence of terrorist organizations and state sponsors of terrorism is designated as "particularly dangerous." This designation is telling because it highlights that the knowledge of an existing relationship which is uncontested in general, but is contested in particular examples emphasized in parts of the terror wars and is sufficient to presume the relationship entails an exchange of a particular class of weapons. In short, the threshold for intervention is kept artificially low, by conflating the dangerous conditions created by a relationship between a state sponsor and a terrorist organization and the conditions created by a state sponsor providing a terrorist organization with Weapons of Mass Destruction.

Although this directive was classified, it offers an important contrast to the public rhetoric of the Bush administration. In the case of Powell's speech to the United Nations, the argument emphasized the possible possession or development of WMD by Iraq in

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[185] Bush, George W. *NSPD-17/HSPD-4 National Strategy To Combat Weapons of Mass Destruction*. 17 September, 2002. Federation of American Scientists. Web. 16 May, 2017. https://fas.org/irp/offdocs/nspd/nspd-17.html

large part because it would demonstrate Iraqi non-compliance with United Nations resolution 1441, which could be the basis either for a new resolution authorizing the use of force or independently justify military action to enforce the resolution (277-278).[186] The discussion of Saddam's support for terrorism was included in Powell's speech, but was a smaller portion that did not have the same levels of argumentative investment. By contrast, when Bush gave the State of the Union address in January 2003, the claims made about Iraq focused on the speculative ties between Saddam and Al Qaeda, emphasizing the possibility of Saddam giving WMDs to Al Qaeda (173).[187]

What this directive indicates is a different internal discourse that focused on the particular variety of threat posed specifically to the United States by WMDs. While Powell presented an argument for why Iraqi possession of WMDs posed a threat to global security and the legitimacy of the United Nations, Bush offered an argument that foregrounded the potential relationship between Al Qaeda and Iraq. The internal discourse illustrates a third concern that undergirds both lines of public argument: That the possession of WMD by potential adversaries posed a grave threat to the United States in particular that might require a military response. Based on the standards set in this directive, even the very low quality of evidence available for the existence of weapons in Iraq was sufficient to justify military action.

Where the policy for the use of force requires an imminent threat defined by the actual intent to supply such weapons and the intent to use them by an organization, the conflation present in this document is relatively innocuous. This document on the other

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[186] Zarefsky, David. "Making the Case for War: Colin Powell at the United Nations," 277-278.
[187] Corn and Isikoff, *Hubris: The Inside Story of Spin, Scandal, and the Selling of the Iraq War*, 173.

hand, advocates a change in the policy for the use of force when the threat includes an attempt to procure weapons by a nation state, regardless of whether or not they intend to deliver them to a terrorist organization. In this context, the conflation of these threats insures that any state sponsorship of terrorism is tied to the threat of WMDs, and can justify a military intervention. Reading HSPD-17/NSPD-4 in this light illuminates why the justifications provided to the public by the George W. Bush administration for the War in Iraq relied so much on the assertion of the existence of WMDs. By foregrounding the ties between Iraq and terrorist organizations, even if the evidence for Iraq procuring WMDs was slim (or nonexistent), the existence of those ties was sufficient to justify the use of force as a preventive measure.

The importance of this document cannot be overstated. It proves that in the earliest days of the Bush administration there was an interest in the use of force as a counterproliferation strategy. Although Iraq may not have been named in this document, the change in policy outlined here makes clear why Iraq was a likely target for the use of force. A history of Iraqi support for terrorist organizations was sufficient to justify the use of force by the United States as a counter WMD strategy intended to prevent terrorist use of WMDs although there was no evidence Iraq was attempting to develop WMDs. The conflict in Iraq demonstrates the far reaching effects of using rhetoric that deliberately conflates threats in formulating U.S. policy.

This particular move, emphasizing the ties between WMD and terrorism would be repeated in a number of other documents, including NSPD-23 establishing a "National Policy on Ballistic Missile Defense." This directive, in a substantial break with the

norms of the genre, was unclassified; however, there was a lag time between the signing of the directive on December 16, 2002, and the eventual leak to the Washington Times that made it public on May 20, 2003.[188] The move to conflate these threats is present in the first paragraph of the document: "As the events of September 11 demonstrated, the security environment is more complex and less predictable than in the past. We face growing threats from weapons of mass destruction (WMD) in the hands of states or non-state actors, threats that range from terrorism to ballistic missiles intended to intimidate and coerce us by holding our cities hostage to WMD attack (para. 2)."[189] By linking the attacks on September 11 to WMD, based on the shared complexity and unpredictability of the threats, two entirely distinct policy concerns, terrorism and WMD proliferation, benefit from a shared exigency.

An example of the inverse of this technique is present in the subsequent paragraph. The argument in this instance relies more directly on the notion that states which sponsor terrorism are de facto threats to the United States. As the directive claims:

> Hostile states, including those that sponsor terrorism, are investing large resources to develop and acquire ballistic missiles of increasing range and sophistication that could be used against the United States and our friends and allies. These same states have chemical, biological, and/or nuclear weapons programs. In fact, one of the factors that make long-range ballistic missiles attractive as a delivery vehicle for weapons of mass destruction is that the United States and our allies lack effective defenses against this threat (para. 3).[190]

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[188] "Bush Case on Defense Plan Cites North Korea" *The Washington Times*. 27 May, 2003. Web. 20 May, 2017. http://www.washingtontimes.com/news/2003/may/27/20030527-124651-5190r/.
[189] Bush, George W. *NSPD-23 National Policy on Ballistic Missile Defense*. 16 Dec. 2002. Federation of American Scientists. Web. 19 May, 2017. https://fas.org/irp/offdocs/nspd/nspd-23.htm.
[190] Bush, George W. *NSPD-23 National Policy on Ballistic Missile Defense*. 16 Dec. 2002. Federation of American Scientists. Web. 19 May, 2017. https://fas.org/irp/offdocs/nspd/nspd-23.htm.

In this instance, states which sponsor terrorism are de facto threats, which means the pursuit of ballistic weapons technology is by definition illegitimate. By linking the practice of sponsoring terrorist organizations (as defined by the United States) to developing ballistic missiles, the policy of the United States expands from simply a War on Terror to a war on countries linked to terrorism, and the scope of a ballistic missile defense policy expands to include countries that do not currently pose a threat, but who based on previous policies they have pursued, are defined as a threat to develop ballistic missile capability.

This directive proceeds to outline a thoroughgoing policy that outlines how the United States and its allies can defend themselves against ballistic missile threats. In part, this involves the development of the ability to defend against ballistic missiles by using evolving weapons systems to work as countermeasures against ballistic missiles. Included in the directive are the development of lasers and missiles that could be used to intercept ballistic inbounds. The development of such systems are of course a violation of the ABM treaty and were authorized while the United States withdrew from that treaty. It is worth noting that none of these technologies has been deployed or even made it past an experimental stage.

The conflation strategy is effective in creating the perception that the United States faces a very specific threat in the form of terrorist use of Weapons of Mass Destruction, which is used as a justification for creating policies to prevent potential regional or global challengers from attaining Nuclear, Biological, or Chemical weapons to threaten the United States. In this way, the exigency created by the September 11

attacks is strategically deployed by the George W. Bush administration to justify a broader policy that supports the supremacy of the United States in global affairs based on the possession of nuclear weapons. In the end this policy would be incorporated into the justifications for the invasion of Iraq, but it would also be used to create a new vision of foreign policy to supplant the norms developed during the Cold War. In particular, the notion of deterrence would be shifted.

Where previously nuclear weapons (alongside other WMDs) would be used as a deterrent against conflict, under the George W. Bush administration conflict to prevent the development and ability to deploy WMD would become the new deterrent. Rather than relying on deterrence to prevent the use of force, force would be used to create deterrence. One could argue that the declaratory nature of the policy embedded in the decision not to classify the directive would make the open threat of force by the United States into a deterrent. Such an argument of course ignores the fact that the United States ultimately resorted to the use of force in Iraq (the declaratory policy failed) and that the means of creating deterrence undermined the point of deterrence (the use of force).

Ultimately the use of directives by the George W. Bush administration took advantage of the open-ended nature of generic constraints to fundamentally change U.S. policy. Because direct control over foreign policy by the executive branch had a legal and traditional defense, the broad use of directives to change policy was relatively unquestioned. Part of the failure to question the changes in foreign policy may well derive from the fact that these directives were classified, but this is less a function of classification than a function of the relatively unimpeachable nature of that classification.

In short, there existed a genre of directives that existed so far outside of congressional oversight, and public consideration, that there was no possibility of a rejoinder.

In the context of such a lack of rejoinder, one could legitimately question why the attempt to conflate the threat of terrorism with WMD threats exists in these documents. Although extant evidence for the reasoning behind these justifications is scattered, a consideration of the nature of these documents answers many of these questions. First, the directives are addressed to agency heads, which means that framing the way those heads understands the policies matters. Framing the threat of WMD and ballistic missiles around the possibility of terrorism creates a set of presumptions about which countries are the target for those policies. This is especially true because these policies change the norms and assumptions that had been the basis for U.S. policy since the Cold War and, by extension, the norms and assumptions that most agency heads already hold. Second, public persuasion efforts to justify conflict later would rely on the same presumptions, forming the policy along the same lines as the public persuasion, and the disclosure of those policies prevents the perception that the public is being misled. These directives then should not be understood as a secret discourse that is unrelated to the publicly visible policy changes and administration discourse. Rather, these directives function as an internal discourse that outlines the goals that drive decision making in a manner that must be rhetorically reframed to persuade the public.

This approach would be used in other directives as well. Directives including NSPD-33/HSPD-10 "Biodefense for the 21st Century," NSPD-41/HSPD-13 "Maritime Security Policy," NSPD-43/HSPD-14 "Domestic Nuclear Detection," NSPD-47/HSPD-

16 "Aviation Security Policy," NSPD-54/HSPD-23 "Cyber Security Policy", NSPD-55 "Dual Use Trade Reform" and NSPD-56 "Defense Trade Reform" all reiterate the same strategies found in the earlier directives beginning with NSPD-17/HSPD-4. Spanning six of the eight years of the George W. Bush presidency, terrorism was a unifying justification for different areas of U.S. foreign policy. Under that unified justification there were two recurring claims. First, that the attacks on September 11 demonstrated a need for dramatic new action. Second, that new threats stemming from terrorism required a paradigm shift in the thinking on U.S. National Security. Although the policies advocated by the Bush administration varied significantly, the changes advocated relied almost uniformly on the notion that the September 11 attacks represented a paradigmatic shift in the foreign policy problems faced by the United States. The language used in the directives reflects an attempt by the George W. Bush administration to take advantage of the kairotic moment created by September 11, and the emerging threats that could be linked to that event, to outline what conservative foreign policy would look like in the aftermath of the Cold War.

What is striking about these directives is the reliance on this particular kairotic moment to create such foreign policy changes. As George W. Bush was the first Republican President to take office after the collapse of the Soviet Union (which had taken place during George H.W. Bush's one term presidency), any major policy change would have represented a redefinition of conservative foreign policy. Yet such a redefinition could only make sense in the context of the problems it was designed to resolve. In this way, conservative foreign policy was awaiting an event that provided a

nuanced rhetorical situation to expand the powers of the presidency. The directives, although different from other mechanisms in that they relied on established powers, were significant as they reflect the vision of a new presidency empowered by the public to exert more direct and expansive control over the foreign policy establishment.

The contrast between the directives issued under the Obama administration and the directives issued under the George W. Bush is demonstrative of the basic function of genre. The existence of a genre implies a repeated form and a specific field of content, but allows for wide degrees of difference in the particular enunciation of belief. Under the Obama administration the role of the PPD in modifying policy remained the same, and the forms that constitute the genre also remained the same. What shifted were the policies articulated through the use of this genre. In order to change those policies, the Obama administration retained the function of the genre and the reliance on framing as a strategy, but worked to reduce the dominant role played by the terrorism frame under the Bush administration.

A particular methodological concern presents itself in an analysis of the directives issued under the Obama administration, "classification." At the time of this writing, either through leaks or through declassification, a very large member of the directives issued under the Bush administration are available. By contrast, very few of the directives from the Obama administration have been leaked or declassified in part or whole. As a result the account offered here is necessarily incomplete, but does provide a reasonable demonstration of the function of directives as a genre under the Obama administration.

The process of shifting away from terrorism began in the first directive issued by the Obama administration. Although PPD-1 does not engage in a discussion of specific policies dealing with terrorism, it does point towards a different set of concerns for the Obama administration. Where the George W. Bush administration took as a part of its intentions and mission the need to expand and organize the powers of the executive branch by centralizing and streamlining control over agency decisions, the Obama administration had to manage the pragmatic demands on the office to address the significant security concerns that persisted at the end of the George W. Bush administration while attempting to make good on a campaign promise to rein in the deleterious effects of an over empowered executive branch. In this context, the decision not to speak to those specific security concerns in the document that outlines the infrastructure for foreign policy decision making is reasonable as a response to the deliberate moves made by the George W. Bush administration to link changing security concerns to changing infrastructure. Although the decision to treat policy concerns separate from institutional organization is less controversial than the move made by the Bush administration, it is no less significant. What Obama attempted to develop was an infrastructure that was able to give the most ideal outcome regardless of the nature of the problem that confronted them, rather than an infrastructure and vision of the presidency that was tied to a specific security problem.

The terror wars posed a distinct problem for the Obama administration. Having campaigned in large part on finding a resolution to the terror wars and the most egregious problems spawned by it, the Obama administration had to reconceive how PPDs could be

used to change or bring about the end of the terror wars. Retaining the standardized forms of the genre, such as references to more abstract values and an emphasis on framing the changing infrastructure of the foreign policy development in terms of those values, the Obama administration stepped away from relying specifically on describing the nature of a threat to justify policy options.

Where the Bush administration frequently argued that the threat posed by terrorism was responsible for the need to restructure the executive branch and by extension the federal government, the Obama administration appealed to a different standard that emphasized organization based on the generalized needs of the executive branch. Focusing on developing a broadly functional infrastructure that was less directly aimed at pursuing the terror wars. Which is not to say that the Obama administration was a complete departure from the George W. Bush administration, but rather that the attempt to link the nature of a threat to political ideology and to an organizational structure was avoided in favor of a strategy emphasizing sound organization that can be adapted to a variety of threats.

The most prescient example of the difference in this approach comes from PPD-2 "Implementation of the National Strategy for Countering Biological Threats." This PPD speaks to addressing a wide variety of threat sources that culminate in the possibility of biological weapons attacks. Where the George W. Bush administration described specific vectors for those threats, emphasizing terrorism, the Obama administration did not. Instead, the possibility of biological attack was treated as a risk that must be dealt

with through responsiveness to the threat, rather than a complete overhaul of U.S. foreign policy.

The document itself does not mention terrorism. It works instead as a directive to enforce the ideas embodied in a second document, "National Strategy for Countering Biological Threats." This document has only eight mentions of the word terrorism, and the strongest wording associated with the threat of terrorism in that document implies that all efforts be taken to interdict biological weapons. This approach would of course imply the use of military force but stops short of the explicit stance taken by the George W. Bush administration authorizing the use of force. It also is notable that rather than couching the need for a strategy on the nature of a terrorist threat, the strategy document instead holds that the need for a strategy to respond to the threat posed by biological weapons. As the strategy document states:

> The effective dissemination of a lethal biological agent within an unprotected population could place at risk the lives of hundreds of thousands of people. The unmitigated consequences of such an event could overwhelm our public health capabilities, potentially causing an untold number of deaths. The economic cost could exceed one trillion dollars for each such incident. In addition, there could be significant societal and political consequences that would derive from the incident's direct impact on our way of life and the public's trust in government (1).[191]

In this way, rather than focusing on specific sources, such as terrorism, this strategy deals with the nature of the threat. This emphasis on the ability to respond and mitigate the threat is a departure from the preventative posture (and its intendent emphasis on military

[191] Obama, Barack. *National Strategy for Countering Biological Threats*. November, 2009. Mission of the United States, Geneva, Switzerland. Web. 16 May, 2017. http://geneva.usmission.gov/wp-content/uploads/2009/12/Natl-Strategy-for-Countering-BioThreats.pdf

force) advocated by the George W. Bush administration. This shift in emphasis has significant implications for foreign policy because it shifts away from the risk posed by specific sources that can be designated as threats subject to military threats.

Beyond the shift away from a discourse emphasizing terrorism as a unique threat vector, this document attempts to break from the strategy of threat conflation. Rather than treating biological weapons similar to other kinds of weapons under the general heading of WMD, this directive pushes towards a more specific concern with the nature of the weapons that might be used. Although this document does not reject the notion that force might need to be used, the focus on developing more precise and nuanced policies tied to more specific understandings of the threat facing the country is a departure from the broader threat conflation strategies used under the George W. Bush administration. This shift in language is significant due to the function served by directives. In framing threats in a more specific and narrow manner, the Obama administration is inviting agency heads to adopt a similarly narrow view, rather than viewing their efforts as part of a comprehensive administrative effort targeted specifically at the War on Terror.

This shift is manifested in PPD-2 as a directive that is less about providing an institutional sense of the will of the executive branch than it is about specific actions that will be taken to satisfy those objectives. In a section titled "Implementation Plans," this is described:

> By 180 days following the date of this directive, recipients will submit to the National Security Staff Executive Secretary a detailed implementation plan that articulates how their department, agency, office, or organization will contribute to implementation of the *Strategy*. Implementation plans

> will discuss: (1) actions and activities that will be taken to support the objectives outlined in the strategy; (2) identification of the lead entity within the department, agency, office, or organization for each action or activity; (3) baseline of current programs, projects, and activities and their resource levels; (4) where appropriate, identification of collaborating and/or coordinating Federal entities for each action or activity; and (5) planned milestones, measures of performance, and – where applicable – measures of effectiveness by which recipient departments, agencies, offices, or organizations will implement the objectives of the *Strategy*.[192]

The wording of this directive differs from the approach of the George W. Bush administration in that it emphasizes specific actions in keeping with a broader policy. In this way, it does not work as a means to create an institutional sensibility, that sensibility is developed in a separate document; rather it is used as a way to describe the specific actions necessary to comply with this sensibility. In a certain sense, this is a more authoritarian and managerial approach that relies on Presidential authority to give more direct control rather than relying on the decision-making ability of agency heads. Yet it is a managerial approach that comes with clear limits on the nature of the policy by placing agency heads in control of implementation rather than relying on a more vague directive that could more easily be subject to the capricious actions of agency heads.

The argument that this directive is less about the War on Terror than comparable directives from the previous administration is not unreasonable, but ignores the significance of this directive. It departs from the recurring motif of the George W. Bush administration that threats posed by Weapons of Mass Destruction have a specific tie to terrorism. This difference produces a document that is much more focused on implementing policies to develop readiness and response capability rather than expanding

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[192] Obama, Barack. *Presidential Policy Directive 2 Implementation of the National Strategy for Countering Biological Threats.* 23 November, 2009. Federation of American Scientists. Web. 18 May, 2017. https://fas.org/irp/offdocs/ppd/ppd-2.pdf

the prerogative of the executive branch and loosening the presumptive limits on Presidential authority. Nonetheless, the loose bounds created under the Bush administration remain in place, but are not called upon to justify policy changes of this sort.

Some directives of the Obama and George W. Bush administration share recurring motifs. Yet in part because of the limits created by the classification of most Obama administration directives to this date, in part because of the deliberate efforts to avoid an emphasis on terrorism like in the document described above, and in part because Obama was not creating a new infrastructure to initiate the War on Terror, the directives used to pursue it directly are relatively few. One of the small number of examples is found in PPD-14, "Procedures Implementing Section 1022 of the National Defense Authorization Act for Fiscal Year (FY) 2012." The National Defense Authorization Act (NDAA) is a yearly bill passed by Congress that authorizes the funding of the U.S. military. Because it must be passed in order for the United States to fund the military, it frequently includes provisions that would be difficult to pass in other contexts. Section 1022 of the NDAA 2012 would be an example of this type of provision which addresses the treatment of the detained members of Al-Qaeda.

The provision would require the President to seek congressional approval in order to transfer detained persons, the intent behind the bill being the prevention of Obama's ability to satisfy a campaign promise to close the detention center at Guantanamo Bay. In response to this bill Obama issued a signing statement that asserted that the provision was an unconstitutional interference in Presidential powers. He also issued a directive to the

executive agencies and the military addressing how the provision would be addressed by the executive branch.

The directive itself strongly harks back to elements that defined the genre under the George W. Bush administration. The first paragraph describes the threat posed in this case by Al Qaeda as one that requires the executive branch to "retain the flexibility to determine how to apply those tools to the unique facts and circumstances we face in confronting this diverse and evolving threat (1)."[193] The emphasis on flexibility defined by the unilateral decision making power of the executive branch is an echo of the language used by the George W. Bush administration to justify a fundamental reconstruction of fundamental foreign policy components such as deterrence theory. Despite these similarities that have become a hallmark of the genre, the purposes to which they were put are substantial and demonstrate the malleability of the genre.

The second paragraph makes a distinct argument. Where the first attempts to defend the need for broad Presidential authority based on a distinct threat, the second makes an argument for broad Presidential authority based on congressional consent:

> Under the Authorization for the Use of Military Force of September 18, 2001 (Public Law 107-40) (2001 AUMF), the executive branch has the authority to detain in military custody individuals who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for the September 11 attacks, as well as individuals who are part of or substantially supported Taliban or al-Qa'ida forces or associated forces that are engaged in hostilities against the United States or its coalition

[193] Obama, Barack. *Presidential Policy Directive 14 Procedures Implementing Section 1022 of the National Defense Authorization Act for Fiscal Year (FY) 2012*. 28 February, 2012. Federation of American Scientists. Web. May 16, 2017. https://fas.org/irp/offdocs/ppd/ppd-14.pdf

> partners. Section 1021 of the National Defense Authorization Act for FY 2012 (Public law 112-81) (NDAA) affirms that authority (1).[194]

This paragraph attempts to do is create redundant justifications for exclusive executive branch control of the treatment of detainees. What is interesting about the justifications provided by the Obama administration is that they are derived not from a very specific ideologically motivated interpretation of the Constitution, but rather from congressional authorization for the use of force. The specific authorizations are from the Authorization for the Use of Military Force Against the Terrorists, which is itself a very short document, and from Section 1021 of the NDAA.

This authorization has few limits or clear direction, which the Obama administration would later acknowledge in pushing for a new authorization for the use of force tailored to addressing ISIS rather than force against terrorist activity linked to Al Qaeda. Indeed, other than saying that military force is authorized, the document does not speak directly to the question of detention of captured persons. The stance taken by the administration mirrors the broad interpretation of the document adopted by the George W. Bush administration, justifying it in the new context of the NDAA.

The problematic part of the NDAA for the Obama administration is Section 1022. This section was written with to prevent Obama from transferring detainees from military custody to civilian custody for trial and to create a process for closing the detention facility at Guantanamo Bay. The objection to this provision expressed in a signing statement was that it represented an infringement on the decision-making power of the

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[194] Obama, Barack. *Presidential Policy Directive 14 Procedures Implementing Section 1022 of the National Defense Authorization Act for Fiscal Year (FY) 2012*. 28 February, 2012. Federation of American Scientists. Web. May 16, 2017. https://fas.org/irp/offdocs/ppd/ppd-14.pdf

executive branch. This sentiment is also expressed in the first paragraph described above, but is not the limit of the directive. The directive itself outlines the procedures that will ostensibly satisfy the demands of Section 1022 of the NDAA while retaining the authority of the executive branch to make the determination about how individual detainees will be treated with the aim of processing detainees and retaining the option of closing Guantanamo Bay.

The section of the directive that most directly pertains to the question of whether or not the executive branch would retain final authority over the treatment of detainees is titled "Application to Individuals Captured or Detained by, or in the Custody of, the Department of Defense." This section effectively refers to non-citizen enemy combatants detained as a part of the War on Terror. The stance of the executive branch is that, "Any time an individual is captured or detained by, or otherwise taken into the custody of, the Department of Defense, the requirement under Section 1022 (a) (1) of the NDAA will have been satisfied, regardless of whether there has been a final determination as to whether the individual is a Covered Person, and regardless of the authorities under which the individual is captured, detained, or otherwise taken into custody (2-3)."[195] In short, taking a person into custody who is not a U.S. citizen under the AUMF satisfies the requirement of having detained persons by the military expressed in the NDAA.

The subsequent sentence gives teeth to the function of having satisfied this section: "Therefore, individuals captured or detained by, or otherwise taken into the custody of, the Department of Defense shall not be subject to the procedures outlined in

[195] Obama, Barack. *Presidential Policy Directive 14 Procedures Implementing Section 1022 of the National Defense Authorization Act for Fiscal Year (FY) 2012*. 28 February, 2012. Federation of American Scientists. Web. May 16, 2017. https://fas.org/irp/offdocs/ppd/ppd-14.pdf.

sections II through IV of this Directive (3)."[196] In other words, once an individual has been detained by the military, the requirement for military detention has been satisfied. In essence, the requirement of military detention has been satisfied because the persons detained have at least initially been under the custody of the U.S. military. Subsequently, any action taken by the executive branch satisfies the conditions for transfer under the procedures outlined in Section 1028 of the NDAA, which would attempt to limit the power of the Obama administration to render decisions about the disposition of persons detained at Guantanamo Bay. In this directive, the Obama administration effectively blocks the attempt by Congress to control the treatment of persons detained in the War on Terror.

To understand the stakes in this move, a return to the introductory section of the document is productive. The third paragraph in the document holds:

> A rigid, inflexible requirement to place suspected terrorists into military custody would undermine the national security interests of the United States, compromising our ability to collect intelligence and to incapacitate dangerous individuals. This Directive specifies policies and procedures designed to ensure that section 1022 of the NDAA is implemented in a manner that is consistent with the national security and foreign policy interests of the United States. Specifically this Directive sets for the procedures required by section 1022 of the NDAA for determining when the military custody requirement of section 1022 applies to non-citizens detained by the United States, when and how any such determination will be implemented, and when and how to waive the requirements of section 1022 (a) (1) when it is in the national security interests of the United States. This Directive also issues several national security waivers (1).[197]

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[196] Obama, Barack. *Presidential Policy Directive 14 Procedures Implementing Section 1022 of the National Defense Authorization Act for Fiscal Year (FY) 2012*. 28 February, 2012. Federation of American Scientists. Web. May 16, 2017. https://fas.org/irp/offdocs/ppd/ppd-14.pdf.

[197] Obama, Barack. *Presidential Policy Directive 14 Procedures Implementing Section 1022 of the National Defense Authorization Act for Fiscal Year (FY) 2012*. 28 February, 2012. Federation of American Scientists. Web. May 16, 2017. https://fas.org/irp/offdocs/ppd/ppd-14.pdf.

This paragraph makes clear that the stakes for the Obama administration remain the same as for the George W. Bush administration. That Congress would compel or limit the decisions of the executive branch is perceived as a risk to the national security of the United States. That these decisions include not only the final disposition of detained persons, but also the "ability to collect intelligence and to incapacitate dangerous individuals" demonstrates that the Obama administration is not disavowing either the powers claimed by the Bush administration or even necessarily the tactics. The stance articulated here is aimed at preserving the power of the presidency much more than one would expect, given the public rhetoric of the Obama administration aimed at justifying disentanglement from elements of the War on Terror including the withdrawal from Iraq.

Which is not to say that there are no differences. Indeed, the differences are quite stark when one considers that the same sentence begins by claiming "A rigid, inflexible requirement to place suspected terrorists into military custody would undermine the national security interests of the United States." This first half of the sentence implies that persons detained in the terror wars should not be doomed to a future of indefinite detention by the United States military, but rather should be dealt with individually rather than as a class of persons subject to a unified policy. Thus, a series of waivers appear later in the document outlining when an individual should not be subject to military detention. The most telling example here is when "placing a foreign country's nationals or residents in U.S. military custody will impede counterterrorism cooperation, including but not limited to sharing intelligence or providing other cooperation or assistance to the United States in investigations or prosecutions of suspected terrorists." This waiver

demonstrates a sensitivity to foreign concerns about the nature of military detention that is not present in the Bush administration directives. It is a holding that recognizes the need for concessions to foreign powers to secure cooperation that Congress has decided to forego, following the Bush administration's willingness to operate unilaterally.

Although the Obama administration sustained the power of the executive branch, it did so while changing the political interests to which that power was put. In this instance, even as Congress tried to push the Obama administration toward a more strict treatment of detainees the power of the executive branch was used to inaugurate a policy that worked in the opposite direction. The simple conclusion here is that the power of the executive branch is universal and can serve either political perspective equally well.

A fundamental question such a conclusion poses is first, this conclusion should not provide solace for those preoccupied with democracy. If the power of the President to unilaterally inaugurate policy can be applied to opposed policy conclusions regardless of public opinion or the view of Congress, there are few opportunities for democratic participation outside of electoral politics. Such a limit might be democratically sound in terms of responsiveness as the President could act on public opinion without relying on Congress, but it lacks channels for input from Congress or the public other than what the President is able or chooses to perceive. As a result, only the pressure of the election can provide a circumstance when public opinion could be definitive. The limits of democracy in a system with such an empowered executive branch is defined by the election, rather than by the ability of the population to participate in governance.

Second, although the power to determine policy can function equally well for opposed policy options this does not mean that the policies have the same opportunities to succeed. The terror wars and the treatment of persons detained in the terror wars is a premier example. Although the authority given the George W. Bush administration to start the war was approximately equal to the Obama administration, the ability of the Obama administration to end many of the practices that began under the Bush administration was much more limited. This difference is readily demonstrated by the fact that even as the Obama administration tried to close Guantanamo Bay, the effort was ultimately ineffective. There are a number of reasons described for why this effort failed, but the fundamental problem was that while the Bush administration had an exigency that justified the creation of a new vision of security and by extension conflict, the Obama administration lacked a clear exigency to shift to a new vision.

It is worth noting that the Obama administration subsequently did not engage directly with the War on Terror in PPDs. Indeed, a year later in a speech at National Defense University he would publicly declare the end of the "Global War on Terror."[198] This is not to say that the threat of terrorism was not referenced in subsequent PPDs. Some of the directives were clearly designed to deal at least in part with symptoms and drivers of terrorism. Notably PPD-30 "U.S. Nationals Taken Hostage Abroad and Personnel Recovery Efforts" was clearly designed to address problems associated with terrorism, but terrorism receives only a cursory mention. The fundamental function of

[198] Obama, Barack. Remarks By the President at the National Defense University. The White House Office of the Press Secretary. 23 May, 2013. Web. Accessed 20 May, 2017. https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/remarks-president-national-defense-university

directives under the Obama administration was more about dealing with specific policy problems that were related to terrorism whereas the George W. Bush administration used directives to create the infrastructure to fight terrorism.

Nation Building

Presidential Policy Directives (PPD) are notable for their utility in outlining the values and interests of the President in particular policy areas. Although they frequently include at least limited policy prescriptions, their general function is to outline a set of judgments on either the nature of the policy problems facing the United States or on what values should guide foreign policy decision making. One exception to this rule is where directives are used to create a new agency or leadership structure. One of the more interesting and controversial used of this particular tactic can be found in the directives issued by the George W. Bush administration to guide the "reconstruction" of Iraq after the Hussein dictatorship was deposed. What these directives demonstrate is how a directive can create the definitions by which a policy problem is understood and addressed. It is worth noting that this is a power that has few opportunities to be tested. The Obama administration, for its part, has issued no comparable directives that exist in the public domain. It is conceivable that in the years to come these directives may come to light, but at the time of this writing there is no evidence that such orders exist.

This is a complication for the methodological approach taken in this analysis that provides two helpful insights. First, while the prevailing argument in this chapter is that a change in the way directives framed the terror wars took place, the absence of such directives from the public record of the Obama administration is not positive proof of a

disavowal of the genre. The frank truth is that the Obama administration did not have the same opportunities to take advantage of the genre, which may be the result of larger strategic decisions which would be in line with the analysis earlier in this chapter, but does not verify it. Second, that the Obama administration did not take advantage of this particular form of directive should not be taken as an indication that it has ceased to matter. As is demonstrated in the directives issued by the George W. Bush administration, directives provide a remarkable degree of flexibility that suits them to the task of ordering the process of developing a new country.

To say that directives intended to build foreign governments work by defining a problem is potentially misleading. It is not the case that these documents rely on definitional argumentation, or even that they necessarily explicitly define specific terms or contexts. Rather, what they provide is a language to understand a particular problem, which gives a richer sense of what values are at stake and how they can best be served. A rhetorical analysis of this particular collection of directives tied to the practice of nation building provides two insights. First, it explains how the George W. Bush administration understood the aims of its efforts at nation building through the broad mandates provided to guide that effort. Second, it demonstrates that while there is a norm in the genre of directives to emphasize value claims in making broad dictates and delegations of authority, this is often done by enunciating core concepts without elaborating their meaning or significance.

That the George W. Bush administration planned not just for an invasion but for an extended occupation and reconstruction of Iraq prior to the invasion on March 1st of

2003 has long been accepted as fundamentally true. What initially remained unclear was how early the planning began and what the initial fruits of that effort were. The first document that indicated the scope of the intentions and efforts of the George W. Bush administration was published as NSPD-24 on January 20th. This classified directive outlined the goals and interests of the United States government in the reconstruction of Iraq. Marking it as a distinct genre of document is the intention of the document to speak on the behalf of a population outside of the United States.

The directive is directed to the same audience, department and agency heads responsible for administering and executing the policies in question. Yet this document is making evaluative judgements for a population that exists outside of the United States and for whom the United States lacks a substantive justification for making decisions on their behalf. To accomplish this, this document in particular (and Presidential directives generally) work to construct what Phillip Wander describes as a "third persona." If the directives engage in a direct communication between the office of the President (the first persona) and the heads of executive agencies tasked with enforcing policy (the second persona) then there is also a population that is the object of the speech that is not present (the third persona). In the development of the infrastructure to rebuild Iraq, there was a deliberate attempt to create an absence in discourses about the U.S. role in the reconstruction of Iraq around the Iraqi people and their sovereignty.

As Wander describes in his writing on the third persona, the natural response to the third persona is disengagement:

> The third persona, therefore, refers to "being negated" includes not only being alienated through language – the "it" that is the summation of all

> that you and I are told to avoid becoming, but also being negated in history, a being whose presence, though relevant to what is said, is negated through silence. The moral significance of being negated through what is and not said reveals itself in all its anguish and confusion in context, in the world of affairs wherein certain individuals and groups are, through law, tradition, or prejudice, denied rights according to being commended or, measured against an ideal, to human beings (210).[199]

In Wander's view, this third persona is a subject that is absent from discussion, and its existence is negated. In the context of the U.S. intervention in Iraq, the third persona relationship between the Iraqi people and the directives issued by the executive branch are particularly potent. In framing the intervention by the United States without consideration for the Iraqi people, formulating a policy that minimized the political agency of those people became easier and by extension made possible the constriction of their human rights.

NSPD-24 is designed to create the infrastructure for the reconstruction of Iraq. As the statement describes, "If it should become necessary for a U.S. -led military coalition to liberate Iraq, the United States will want to be in a position to help meet the humanitarian, reconstruction, and administration challenges facing the country in the immediate aftermath of the combat operations. The immediate responsibility will fall on U.S. Central Command; overall success, however, will require a national effort (1)."[200] Subsequently NSPD-24 describes the organization of a "post-war planning office" that will be run out of the Department of Defense reliant on expertise from other agencies to rebuild the infrastructure of the country after the Hussein government was swept away.

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[199] Wander, Phillip J. "The Third Persona: An Ideological Turn in Rhetorical Theory." *Central States Speech Journal* 35, Winter, (1984): 210.

[200] Bush, George W. *National Security Presidential Directive 24 Iraq Post War Planning Office*. 20 January, 2003. Federation of American Scientists. Web. 19 May, 2017. https://fas.org/irp/offdocs/nspd/nspd-24.pdf.

The document contains several oblique references to "previous planning" which give the troubling sense that the decision had been made much earlier to prepare for a regime change. What is more troubling is that despite this planning, there is little in the document that leads one to believe that the people of Iraq were a consideration at all.

The document includes a large list of objectives for the post-war planning office, among them humanitarian assistance, establishment of a post war economy, and a civilian controlled military (the closest the document comes to describing a government). What is not accounted for in these objectives is a role for the Iraqi people in determining what might be included, excluded, or added to those objectives. In short, the post war planning office is being given the role of determining what the future ought to look like for Iraq, deliberating ignoring the obvious fact that the Iraqi people might wish to have a say in that future.

The Post-War Planning Office described in NSPD-24 would become the domestic auxiliary for what was called the internationally led Office for Humanitarian and Reconstruction Assistance (OHRA). This office, created the same day NSPD-24 was issued, was led by the United States, but included representatives from other allies in the ever nearing invasion effort. After the fall of the Ba'ath government led by Saddam Hussein in April 2003, the OHRA was transformed into the Coalition Provisional Authority (CPA) tasked with governing Iraq. The first leader of the CPA, retired Lieutenant General Jay Garner, was dismissed from his position after less than a month for refusing to pursue a policy purging the Ba'ath party from Iraqi society known as "de-

Ba'athification." His replacement, Lewis Bremer, pursued the policy until the new government for Iraq was created in June 2004.

The policy of de-Ba'athification, likened to de-Nazification by its advocates, essentially mandated the permanent removal of anyone with ties to the Ba'ath party from civil politics. This policy was subject to a substantial amount of criticism, usually stemming from two lines of argument. The first was practical, with essentially a one party government ruling Iraq for years, there were few persons with government experience to run the country following the overthrow of the government. Second, by permanently banning Ba'ath party members from government, the democratic and sovereign nature of the Iraqi government was called into question by banning a large portion of the population from participation. Although this policy is not outlined or described in NSPD-24, the wording of that document, and the decision not to acknowledge a role for the Iraqi people to decide fundamental aspects of the post-war government undermined the possibility of the government being perceived as legitimate.

The CPA only existed for one year; in that time it focused on creating the infrastructure for a government in Iraq that could at the same time satisfy the political interests of the United States in the region while effectively ruling Iraq. Although it was intended to function as an international body, the CPA was controlled and primarily supported by the United States Department of Defense. Although it was intended to function as a "coalition" government that was supported by all of the countries involved in the invasion, it was run out of the Department of Defense and effectively served the United States government, which narrowed the definition of its mission to what could be

found in NSPD-24. Even this narrower mission was not small task, especially when one considers that the origins of Iraq as a state have more to do with the colonial interests of Great Britain than with the interests of the Iraqi people. Nonetheless, what the CPA was able to do was effectively oversee the humanitarian efforts, manage the most basic of government functions, and with the capture of Saddam Hussein in December 2003, prevent the reemergence of the Ba'ath party. In this way, during its short lifespan, the CPA was able to satisfy the immediate needs of the U.S. government.

After a year of existence, with most of the substantive military objectives in Iraq satisfied, the CPA was to be dissolved and the Iraqi government formed in its place. To accomplish this, NSPD-36 was published on May 10, 2004. This NSPD offered little in the way of direct guidance for what the actual structure in the Iraqi government, but is instructive in the values that guided the U.S. in its attempts to shape the government that Iraq would create. This NSPD is noteworthy in that even as the U.S. government is formally separating itself from the sovereign apparatus of the Iraqi government, as it does so it defines the values inherent in the government that would be created.

The driving characteristic of this government is democracy augmented by economic reform. As the first sentence of the statement reads, "We have seen a period of significant advancement in Iraq, as the yoke of Saddam Hussein's tyranny has been thrown off and democracy and economic reform have begun to take root (1)."[201] In this way, the changes under the CPA, despite limiting the ability of the people of Iraq to create their own government, are cast as democratic by differentiating them from the

[201] Bush, George W. *National Security Presidential Directive 36 Iraq Post War Planning Office*. 10 May, 2004. Web. Federation of American Scientists. 23 May, 2017. https://fas.org/irp/offdocs/nspd/nspd-36.pdf

previous tyranny of Saddam Hussein. This maneuver works by setting a remarkably low threshold for what constitutes democracy. The Hussein regime itself was not democratic in a substantive sense. Nonetheless, the extremely low standard set for democracy here is not particularly strong evidence for democracy as the result of the CPA's decisions. As indicated above, there were substantial constraints on participation in democratic practice placed on the members of the previous government because of party affiliation.

The subsequent reference to democracy comes toward the end of the document. In this reference democracy is framed as a demand on the agencies of the United States Federal Government by holding that, "The effort to build a strong bilateral relationship with the Government of Iraq and support Iraq as it makes the transition to democracy must have the full commitment of all agencies." This sentence is distinctive in that it frames the notion of democracy in Iraq as a goal that the country is transitioning toward. Excluding the possibility of alternative forms of government, while simultaneously remaining vague on just what constitutes democracy, this paragraph frames this transition as a call to continuing action on the part of federal agencies. The emphasis on using phrases such as "full commitment" and "maximum extent possible" indicates that this goal is of remarkable importance. What this paragraph does, which is significant, is that it ties the decision making process to the executive branch, and as written, to the signee, George W. Bush. As discussed in the previous chapter on signing statements, one of the tendencies under the George W. Bush administration was to center decision making power under the executive branch; this NSPD was no different.

Which is why the second value described, sovereignty, provides an interesting object of analysis. Sovereignty is featured alongside democracy in the first sentence of NSPD-36, but rests on even more tenuous ground, given the very concept of the CPA is antithetical to a sovereign Iraqi government. Nonetheless, the sentence indicates that the Iraqi government ought to retain sovereignty. The question that is left unanswered is what the nature of that sovereignty is. The rest of the document provides some evidence that would indicate that the sovereignty foreseen by the George W. Bush administration was substantially limited.

The way in which sovereignty was limited was by framing sustained democracy as a consolidated gain by the United States. The wording of the second paragraph, "During these critical times, we must organize to advance these gains and establish and sustain a strong bilateral relationship" implies that the gains are made by the United States as much as they are by the Iraqi people. It also implies that the aim of the United States is to situate itself to best take advantage of the return of sovereignty to the Iraqi people. At play in this characterization is an emphasis on the notion that the United States has a right to benefit from its efforts in Iraq, and that to do so requires an infrastructure dedicated to assuring those gains.

Finally, and most poignantly, NSPD-36 refers to the need to create a "bilateral relationship" between the United States and Iraq. Toward that end, the presumption is that the Iraqi government exists as a separate entity from the United States. In that vein, the logical conclusion would be that the United States has at best limited authority over the decision making process of the Iraqi government. The problem is that the role the

United States envisions for itself goes significantly beyond the sort of equal partnership inferred in a bilateral relationship. This would be further highlighted in NSPD-37, issued three days after NSPD-36, which outlined plans for the "de-Ba'athification" of Iraq. This policy, continuing the work of the CPA, essentially aligned the United States against the inclusion of the Ba'ath party in the government of Iraq by lending resources and assistance to the prosecution of any member of the Ba'ath party.

The picture of sovereignty that emerges is less one of an independent Iraq that will determine the nature of its own government than it is a sovereignty that allows independence only within a set of permissible coordinates. These coordinates are defined by democracy as defined by the United States, sovereignty tied to an ongoing diplomatic relationship between the United States, political participation excluding many of those who had been politically involved in the country prior to the invasion. If one takes the definition of sovereignty provided by Carl Schmitt as the ability to render a decision upon the exception seriously, the NSPDs issued developing the infrastructure for the reconstruction of Iraq, the United States government and, in particular, the executive branch, is exercising sovereignty over Iraq.

The charge that the government of Iraq left in the wake of the U.S. occupation was a puppet government[202] has been levelled in a number of different ways (127-128).[203] As described above, at the very least the executive branch viewed the notion of Iraqi sovereignty as a conveniently limited concept to serve the interests of the United

[202] It is worth noting, as Cockburn does in his book, that many of these perceptions were shared by the Iraqi people and political leaders in Iraq such as Dr. Mahmoud Othman who served as a member of the Iraq Governing Council.

[203] Cockburn, Patrick. *The Occupation*. (New York: Verso Press, 2006), 127-128.

States to create an amiable government in the region. Setting aside the question of direct control of Iraq by the United States, the question of changing the politics embodied in the government of a country is to question the first principles of the government's philosophical foundation. That the United States government attempted to define these first principles for the Iraqi people is evident in NSPD-58.

NSPD-58 was published in July 2008, in the waning days of the George W. Bush presidency with an election only a few months away. When it was published NSPD-58 was classified, perhaps to avoid the perception that it was interfering either with the election or the subsequent administration, or perhaps more simply because of the hotly charged political climate facing the President. In 2008 the government of Iraq had been established, but was fighting a country-wide insurgency that at times threatened to overthrow the government. The United States had retained a troop presence in the country since the invasion and had played an active role in combatting insurgents with varying degrees of success. With the ongoing conflicts in Iraq as well as Afghanistan, simmering tensions with Iran and North Korea (the other countries who constituted Bush's "Axis of Evil"), and tensions strained with allies over the Iraq invasion, the George W. Bush administration had many foreign policy problems that would be passed on to the next President. In this context, NSPD-58 was issued as an attempt to give direction to foreign policy in the waning months of the Bush presidency while generating a bolstered sense of institutional commitment that would be institutionalized and spill over into the next presidency.

In this vein the title of NPSD-58, "Institutionalizing the Freedom Agenda," is a statement of an agenda not just of a President, but of a country. That the document itself was classified is a hallmark of the genre, but proves plainly that Bush viewed this document not as a public defense of the principles of the Bush administration, but rather as an institutional commitment to those principles on behalf of the executive branch and by extension the foreign policy establishment. The agenda outlined in the document, though not limited to Iraq, demonstrates what the meaning behind concepts such as democracy and sovereignty mean for the Bush administration, and brings full circle the relationship between PPDs generally and those dedicated to the task of nation building.

NSPD-58 defines the "Freedom Agenda" in it's first paragraph titled plainly "policy:"

> It is the policy of the United States to seek and support the growth of democratic movements and institutions in every nation and culture, with the ultimate goal of ending tyranny in the world. The promotion of freedom, justice, human dignity, and effective democratic institutions are central goals of our national security. This directive records and codifies this policy and the organization and procedures developed to carry it out (1-2).[204]

Taken at face value, this agenda seems relatively unobjectionable, at least to the extent one invests a politically neutral definition to the terms "freedom, justice, human dignity, and effective democratic institutions." The problem that readily presents itself is that the alternative to these terms is posited as "tyranny," which implies that there are objective standards which readily delineate the positive terms from the negative term "tyranny." Unfortunately the objective standards are lacking, both in NSPD-58 and in the public

[204] Bush, George W. *National Security Presidential Directive 58 Institutionalizing the Freedom Agenda*. 17 July, 2008. Web. Federation of American Scientists. 22 May, 2017. https://fas.org/irp/offdocs/nspd/nspd-58.pdf

discourse of the Bush administration. Instead, what is substituted is the capricious perspective of the decision maker, contextually speaking the George W. Bush administration and more broadly speaking the executive branch. The terms themselves lacking an external source of validation, become defined through their use by the Bush administration and work as a post hoc rationalization for policies like the invasion of Iraq.

The second paragraph provides a defense of the specific framing of these values and issues in the terms used to justify that invasion:

> Championing freedom is a national security imperative. Governments that respect the human rights of their own people are more likely to uphold responsible conduct toward other nations, and the advancement of freedom is the most effective long-term measure for strengthening international stability, reducing regional conflicts, countering terrorism and terror-supporting extremism, and extending peace and prosperity (2).[205]

That freedom is a national security imperative is a controversial claim, because it requires demonstrating that the way a country treats its citizens will contribute to the way it treats other countries. The paragraph asserts that just such a relationship exists, without in fact providing evidence substantiating the claim. That a directive is not written in an argumentative manner providing such evidence is not a surprise, because when issuing a directive, one need not give a rigorous defense of the reasoning. The function of the assertion here is to create a list of markers that can be identified as characteristic of countries that pose a significant risk to the national security interests of the United States.

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[205] Bush, George W. *National Security Presidential Directive 58 Institutionalizing the Freedom Agenda*. 17 July, 2008. Web. Federation of American Scientists. 22 May, 2017. https://fas.org/irp/offdocs/nspd/nspd-58.pdf

By phrasing the paragraph so that countries which support the human rights of their own people contribute to United States security interests, countries which do not support human rights for their own people are cast as threats to those efforts. This reversal creates the conditions under which even countries which do not pose an immediate threat to the United States can be described as threats, replicating the public discourse by the Bush administration that linked the threat of terrorism from Iraq to the human rights abuses committed by the Hussein regime. Hence, even though Iraq is not named in the document, the document is an attempt to define U.S. policy generally in line with the decision making that led the United States into Iraq. Rather than articulating a new or different policy agenda, the document is intended to institute the Bush doctrine as a guideline for the conduct of foreign affairs.

What is remarkably absent in this paragraph is the question of what effects human rights abuses have on the people subject to them. The "Freedom Agenda" holds that the United States should work to prevent human rights abuses, not for the sake of the people subject to them, but because it will contribute to the security of the United States. This frame deliberately excludes from consideration the human worth of persons subject to human rights abuses and subordinates them to the security interests of the United States. To defend this position one might argue that such an elision is inconsequential if the intervention by the United States succeeds in ending human rights abuses. Such a view is problematic in that it ignores that an intervention carried out by the United States to prevent human rights abuses based on its self-interest is an intervention that does not value the people subject to that intervention. As a result, in the name of "freedom"

human rights abuses and war crimes are acceptable because the consequences of the action are not weighed against the cause of action. Instead, the consequences are evaluated against the external measure of United States security interests.

In these two paragraphs the "Freedom Agenda" is described as less a global humanitarian investment in civil liberties than as a contingent policy to address a perceived security deficit. This posturing is significant because it belies the institutional commitments of the executive branch. The practical implications of this agenda are an attempt to lay a doctrinal motive for the decision making behind Iraq that can be replicated to respond to future conflicts. To do this NSPD-58 subsequently outlines a series of principles that follows the delineation between free and tyrannical governments. In that it provides general policy prescriptions, the list is interesting, but from a rhetorical perspective it adds little to the discussion because it repeats the dictum that all of the efforts by the United States should be oriented toward undermining oppressive regimes by any means possible and supporting democratic regimes by any means possible.

In a later section of the directive three "typologies" are offered defining other countries in relation to the United States for the purposes of administering aid: Threatened or fragile democracies, authoritarian regimes, and closed totalitarian regimes. These typologies delineate countries that have differing relationships to the principle of freedom at the heart of the agenda. Although there is no effort made to define these typologies in lieu of describing policy orientations toward them, they function to delineate different government formations in an unclear manner. What is interesting in

this typology is not so much how the individual definitions delineate among government formations, but the elements that are shared among the definitions.

The most significant of these shared elements is democracy. Remarkably, while all of the typologies are defined by their relationship to democracy, the term democracy itself lacks definition. In the absence of this definition, as described above, capricious decisions on the nature of a foreign country's government becomes the work of the executive branch. This capriciousness perhaps can be considered less of a concern with "closed totalitarian regimes"[206] in that they ostensibly so thoroughly lack democratic institutions and functions that they can hardly be confused (although the capricious application of an absent definition means that confusion is always possible) but for "fragile or threatened democracies" and "authoritarian regimes" the distinction is far less clear.

For both of these forms of government, fragile or threatened democracies and authoritarian regimes, the description of policy orientation refers to influencing elections to favor democratic groups. The language does not at any point make clear what it means to influence elections, other than to allow for peaceful and meaningful competition by democratic parties. This shared notion calls into question what the substantial difference is between these two typologies. Realistically, there is a reason for the difference, but it seems to be a difference in degree rather than a difference in kind. This thinking has an echo of the Cold War embedded within it, stemming from Jeanne Kirkpatrick's argument that dictatorships have greater democratic potential than

[206] Although NSPD-58 does not make this reference specifically, one could infer that North Korea would be an example of such a regime given Bush's past rhetoric in describing that country as a part of the "Axis of Evil."

communist or religious totalitarian states because they can more easily be liberalized where the state institutions remain strong.[207] Kirkpatrick's influential 1979 essay and subsequent book became a touchstone for conservative officials who wanted to defend the practice of propping up autocratic governments that supported U.S. interests during the Cold War. An echo of this argument is present in NSPD-58. Authoritarian governments are placed in a similar position in relation to weak or threatened democracies because certain of the conditions necessary for change exist even if the nature of the existing government is different. The problem is that although NSPD-58 affirms the difference between regimes, the standard for that difference remains unclear, lending itself not just to confusion between typologies, but also to conflation of different governments. It becomes possible to treat an autocratic regime, such as Syria, in a more benevolent manner than a democratic (if also authoritarian in practice) government such as Venezuela. In this way the use of democracy as a tool to define freedom is not tied to an objective standard or bright line, but rather is a malleable term that can strategically bedeployed to suit U.S. interests.

Fundamentally, the practice of creating typologies works to narrow the possibilities for a final decision. The typologies described in NSPD-58 work to limit the options of a decision maker to identify specific options that correspond to the notion of freedom mediated through the concept of democracy. This act is fundamentally a practice of sovereignty. That it is tied to aid, including as the document describes in various places material, diplomatic, and military assistance, demonstrates a means by

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[207] Kirkpatick, Jeanne. "Dictatorships & Double Standards." *Commentary Magazine*, 1 Nov. 1979. Web. 20 May, 2017. https://www.commentarymagazine.com/articles/dictatorships-double-standards/.

which the sovereignty of the United States expands beyond its borders to directly influence the policies and politics of other countries. This could be argued away as mere arrogance on the part of the Bush administration that the United States aid was such a powerful force that the decisions it rendered could be so significant. Unfortunately, such an account ignores that arrogance in belief can be followed by arrogance in action. That this document functions as a doctrinal affirmation of the policies behind the United States involvement in Iraq is a plain testament to this fact.

The George W. Bush administration could well have imagined itself as operating in a unipolar moment, when the lack of a clear rival imbued it with the desire to control significant parts of the world and exercise sovereignty at a distance. The directives issued under the administration certainly speak to such a perception, not just in the context of Iraq, but more broadly in terms of how the State Department and other executive departments and agencies were directed.

Working in Secret

What is telling about the actions taken by both Presidents is that even as they described different conceptions of the presidency and Presidential power, neither undermined the power of the executive branch nor sought to democratize it. Instead both asserted policies that relied on a vision of unilateral executive action to address security concerns, relying on the power of the office to declare an exception to normal rules of engagement. Under both conceptions of the presidency there is an inherent investment in the need for the executive branch to serve a primary function in how security is addressed and foreign policy goals are defined.

With a lack of public access to these decision making processes, and a lack of legislative accountability for the use of directives, the prospects for democracy in this context look weak. Admittedly, in the context of the cyber attacks, there was a concern in PPD-20 issued by Obama that a timely response limits the ability to take advantage of legislative checks. Nonetheless, the move to devolve the decision on a preventative response to an agency head without legislative approval is demonstrative of an attempt to exclude the legislative branch from the policymaking process. In a more direct manner, the decision by the George W. Bush administration to unilaterally generate almost the entirety of the policy surrounding the terror wars using directives was antithetical to the premise of democracy.

The remarkable characteristic of directives is that in classifying documents the President is able to create a limit on public discourse. This ability obviously creates a limit on democracy, but nuancing that understanding is important. Hallsby argues that the defining characteristic of secrets in public policy discourse is that there largely exists an official discourse that prefigures the secret (355).[208] In Hallsby's view, the discourse around a secret gives the rhetor control over the revelation of the secret, from which emerges its strategic utility. In the case of both the George W. Bush and Obama administrations there is certainly an element of this insight at work. In both cases, Presidents were taking bold action that included policy changes readily disclosed to the public. Yet behind this public discourse, there existed a private discourse that operationalized policies which operated independent of the public discourse.

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[208] Hallsby, Atilla. "Imagine There's No President: The Rhetorical Secret and the Exposure of Valerie Plame," *Quarterly Journal of Speech* 101, No. 2, (2015): 355.

Yet what the directives illustrate is that when the secret exists in documents which change policy, the prefiguring is at the same time always disclosed in the actions of the presidency. As Bush changed U.S. military policy wholesale, and Obama created a new infrastructure to address cyber security, the public was kept in the dark. Yet even in this darkness, actions were being taken. What Hallsby's insight provides us, then, is a means to hold the Presidents accountable by figuring the keeping of a secret as a rhetorical choice that produces a reality apart from the secret. Yet from the perspective of democratic practice, this is not a palliative.

The harsh reality of the function of the directive is that the practice of secrecy elides the actions that are taken. The very malleability of the genre, the way frames are deployed in the genre to create sensibilities for agency heads creates the potential for a secret with consequences that go beyond the scale inferred in Hallsby's analysis. The scope and scale of presidential action taken through directives may not change the structural insight Hallsby provides, but it does call into question the implication that foregrounding the rhetoricity of the secret resolves the most deleterious consequences of it. To the credit of the Obama administration and those who have taken the risk of leaking these documents the peek behind the curtain provided by the disclosure of directives offers an important insight.

When Presidents act through the use of directives, they render decisions on the nature of public discourse. In the instances when they are classified, the public discourse is deemed dangerous or threatening. That Presidents are able to render such a judgment on issues with far-reaching consequences poses very genuine and real risks for

democratic practice. Without public scrutiny or congressional oversight, there is little possibility for rejoinder to presidential action.

Chapter 4: Executive Orders

Of the powers claimed and held by the office of the President, none is more publicized than the executive order. Where other presidential powers provide the tactical ability to skirt public scrutiny, executive orders are publicly accessible. All are published in the federal register and, therefore are available not only to journalists, but also the general public. Moreover, the volume of reporting on executive orders indicates a degree of public consciousness of their role that creates a distinct function for them more than clandestine presidential powers. The executive order is less a secretive strategy than an attempt to make a public statement by changing U.S. policy.

Executive orders provide a distinct approach to U.S. foreign policy defined less by an attempt to change policy than by actively signaling a fundamental change in foreign policy. An executive order is not used solely to send a signal; it is a means to change policy. As discussed later, executive orders typically deal with the minutiae of organization and direction of policy. Despite this bent toward bureaucratic control in the content of the executive order, they also serve an important public function that is apparent in the language used.

Executive Orders not only provide a practical application of power, but also designate particular persons, organizations, or governments in relation to the nexus of power available to the President. The executive order in this way works to define the terms under which public discourse takes place. In other words, the executive order is a tool that is written to convey distinct but related meanings to different audiences to deploy multiple forms of presidential power.

Executive orders operate on three different registers, often simultaneously. First, there is interbranch competition as the presidency attempts to lay claim to decision-making power without relying on congressional grants of authority. Second, there is an assertion of sovereign decision-making embodied in the decision to take unilateral action in a public declaration. Third, there is administrative discourse taking place between the office of the President and the agencies which are being created and administered. By operating on these three registers, the executive order serves multiple functions that allow the presidency to simultaneously address multiple audiences and more fully control the discourse at hand.

Political Consequences of Executive Orders

Executive orders have been a significant part of the presidency since its inception. Almost every President issued orders that relied on Article II, Section 3, Clause 5 of the Constitution based on the words "he shall take Care that the Laws be faithfully executed," which implies the need to execute the laws. Beginning with Washington it was a common practice to issue such orders, but the practice was not normalized until the Lincoln presidency when Executive Order 1 "Relating to Political Prisoners" was published. Subsequently, each order was numbered and most were made publicly accessible with the establishment of the Federal Register.

One of the common misperceptions of executive orders given their expansive use under the George W. Bush administration is that they are documents that only recently became an important part of the presidency. This is plainly false when one considers that between the Lincoln presidency and the George W. Bush presidency 13,197 executive

orders were issued.[209] This chapter focuses on a narrowly defined problem created by executive orders, namely, the consequences of using executive orders for governance during conflict.

One problem is the appearance of deliberately hiding real intentions. As Cooper argues, using tools outside of the normal legislative process for forming policy can create the perception of an effort to obscure the intent of the president in order obfuscate or complicate public criticism (138).[210] The problem with the perception of executive orders is not so much an attempt to avoid the normal decision-making process or to hide intention, but rather that the deliberative process remains hidden.

The conventional wisdom is that in using an executive order the President is attempting to circumvent a competing hostile Congress. A more nuanced view held by Deering and Maltzman is that Presidents might attempt to circumvent a hostile Congress, but avoid using executive orders that are so unpopular to a hostile Congress that they might be overturned (777-778).[211] In this view the executive order is not a panacea to the problems of competition between the executive and legislative branches. Rather, the executive order is an action that relies on existing support within Congress. What is noteworthy is that the support within Congress does not have to be majoritarian, rather the support only has to be large enough that legislation overriding the executive order is unlikely to succeed. Executive orders take advantage of a privileged relationship

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[209] Deering, Christopher J. and Maltzman, Forrest. "The Politics of Executive Orders: Legislative Constraints on Presidential Power." *Political Research Quarterly* 52, no. 4, (1999): 767-783.
[210] Cooper, Philip J. "The Law": Presidential Memoranda and Executive Orders: Of Patchwork Quilts, Trump Cards, and Shell Games," *Presidential Studies Quarterly* 31, no. 1, (2001): 138.
[211] Deering and Maltzman, "The Politics of Executive Orders: Legislative Constraints on Presidential Power," 777-778.

between the executive branch and the partisan division in the legislative branch to enact policy without receiving traditionally required levels of legislative support.

The executive order is also a strategic means to respond to past and future presidents. As Mayer and Price note, presidents often use executive orders to rescind past executive orders and require action on the part of future presidents to rescind executive orders (369-370).[212] That executive orders respond to past and future presidents without relying debate prompts Mayer and Price to argue that, "presidential power is more than the power to persuade; it is also the power to command, though such authority is always contingent on the political and institutional constraints of a given moment (370)."[213] The description provided demonstrates the potential for capricious and rapid policy changes that emerge from executive orders. Between the pressures of legislative and legacy competition executive orders lend themselves both to fragility and aggressiveness as a practice that appears antithetical to a consistent legal system.

This problem was foreseen by William Howell and Terry Moe as the result of institutional pressure as well as a desire for a personal legacy. In their view the pressure derives from vagueness in the Constitution regarding the nature of the presidency. As they argue:

> The Constitution sets out the entire design of American government in just a few brief pages and is almost entirely lacking in detail. It does not define its terms. It does not elaborate. It does not clarify. While some of the powers it allocates are straightforward – the president's power to veto legislation, for instance – many of the others, including powers that are quite fundamental, are often left wholly ambiguous. The actual powers of the three branches, then, both in an absolute sense and relative to one

[212] Mayer, K.R. and Price, K. "Unilateral Presidential Powers: Significant Executive Orders, 1949-1999," *Presidential Studies Quarterly* 32, no. 2, (2002): 369-370.
[213] Mayer and Price, "Unilateral Presidential Powers: Significant Executive Orders, 1949-1999," 370.

> another, cannot be determined from the Constitution alone. They must, of necessity, be determined in the ongoing practice of politics. And this ensures that the branches will do more than struggle over day – to – day policymaking. They will also engage in a higher order struggle over the allocation of power and the practical rights to exercise it (853).[214]

This argument positions the role of the executive order as an exercise of power that positions the executive branch as a policy making body in opposition to the other branches. Each executive order not only changes policy, but privileges executive branch over the other branches. Moe and Howell proceed to argue that pressures to create positive social impacts create pressures for presidents to take advantage of ambiguity to exercise power more broadly than would otherwise be desirable or possible (854).[215]

Although it promotes a presidential agenda, it often is the result of pressure on the executive branch rather than a product of deliberation over the desirability of a policy position. As such, it is a politically powerful document with unforeseeable political consequences. It can change the balance of power between branches; it can prompt public backlash (or support); and it can arouse the ire of Congress because a policy is undesirable or because it interferes with congressional authority.

A more specific problem arises: To what extent are executive orders an intervention that undermines the perception of the presidency? There are two distinct levels at which the executive order can complicate and undermine relations between the executive and the other branches and the public. First, because it is perceived as a circumvention of the legislative branch, the advantages of policies are lost behind the veneer of unitary decision making. Second, because the executive order enacts the

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[214] Howell, William G. and Moe, Terry M. "Unilateral Action and Presidential Power: A Theory." *Presidential Studies Quarterly* 29, no. 4, (1999): 853.
[215] Howell and Moe, "Unilateral Action and Presidential Power: A Theory," 854.

expansion of executive branch power, it calls into question the existence and function of separation of powers.

Even if executive orders work as a means to change policy, they do so in a manner that carries the additional risks of upsetting the constitutional balance between branches. What is impressive in the work done by political scientists on executive orders is the sensitivity to the performative and symbolic power of executive orders. What is lacking, and what this chapter hopes to provide, is a means to understand how executive orders work as a discursive tool that shapes not only the constitutional division of powers and the relationship between presidents and the public, but also the character of public discourse.

Rhetoric and Executive Orders

Despite the prominence and public recognition of executive orders, from the standpoint of a rhetorician they are among the least well understood from a theoretical point of view. Where signing statements have a tie both by tradition and practice to orality, and PPDs by virtue of their malleability are remarkably subject to the power and function of language, executive orders are understood legalistically. This legalistic focus dominates the theoretical understandings of their function. Reconfiguring this theoretical norm to account for the impact of rhetoric embedded within executive orders is necessary to explain how presidents understand and use this exceptional power.

Executive orders function primarily as a means to change policy closely related to the symbolic function of the presidency, which requires an understanding of how language functions that is attentive to different ways in which policy changes affect

discourse. Where a very fundamental policy change may alter the conditions under which discourse proceeds, it is a very different change when a president works to ease acceptance of a policy by incorporating the language of the policy into public discourse. Explaining how executive orders can simultaneously enact policy and symbolic change through their content.

Executive orders command action from those over whom an individual or decision making body purports to have authority. Although they are publicly published, they only seek to direct action by federal agencies over which the executive branch has a reasonable basis to assume incontrovertible authority. Others are primarily symbolic, intended to serve both purposes as part of a "going public" strategy. Yet the distinction between the norm and the exception for the purposes of this chapter is not important, because my concern is to make sense of how George W. Bush and Obama attempted to change the direction of the country through executive orders.

The crucial insight for understanding executive orders is found in Asen's discussion of "the rhetorical character of the policy text (124)."[216] Asen posits public policy as a mediation between rhetoric and its material effects. In so doing, his argument develops a view that state power becomes an intermediary step between the will expressed in public discourse and changes in the living conditions which confront the population. There is a disjunction between public rhetoric and policy change that must be acknowledged. This disjuncture is found in the executive order. Where it relies on public discourse to find its public justification, the executive order that begins the

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[216] Asen, Robert. "Reflections on the Role of Rhetoric in Public Policy." *Rhetoric and Public Affairs* 13, no. 1, (2010): 124.

enactment of material change. In this way, it is not merely public discourse, but rather is the moment of change between public discourse and policy change.

Understood properly, executive orders act as a command to inaugurate selected elements of public discourse and in executing the will of the president. Rhetoricians in their criticism of the public discourse of presidential rhetoric have not included executive orders within the canon of presidential rhetoric. The result is that the question of how presidential rhetoric can function as a command has not been explored. Indeed, the notion of a rhetoric of command is notably lacking. To the extent that it is represented in social movement rhetoric literature it is used to explain why social movements emphasize a potentially coercive rhetoric rather than a focus on persuasion as an assertion of identity.[217] Yet this argument, cannot adequately account for the possibility of a body that has the benefit of presumptive authority to act.

For this reason, a return to the concept of the performative outlined in the first chapter is productive. Where in the first chapter the emphasis was placed on the ability to gain consent through repetitive performance, executive orders are similar to presidential policy directives in that they were already well established as a means to enact policy change. The shifts in the George W. Bush presidency were less a question of what could be done with executive orders, but rather a question of how this more public and direct form of established presidential powers could work to support an existing effort. Toward that end, the performative element embedded in executive orders

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[217] Gregg, Richard B. "The Ego-Function of the Rhetoric of Social Protest." *Philosophy and Rhetoric* 4, no. 2, (1971): 71-91.

had less to do with the establishment of norms than with the use its capacity to deploy the powers of the office in novel ways.

There is a tendency in speech act theory, and in particular in the work of Austin, to emphasize the power of the performative in terms of its ability to do something by speaking, described as the illocutionary form. That executive orders require action rather than changing the state of affairs by acting, they are perlocutionary. Austin's description make clear the difference, "We must distinguish the illocutionary from the perlocutionary act: for example we must distinguish from 'In saying it I was warning him' from 'by saying it I convinced him, or surprised him, or got him to stop' (109)." Executive orders primarily function in the perlocutionary manner, that is, they do not inaugurate a state of affairs, rather they use language to prompt action. Executive orders have an illocutionary element, but whereas signing statements work by inaugurating a particular interpretation of law that is executed and informs the actions of others, executive orders command others to action.

A problem in the development of speech act theory is the derailing of the notion of a perlocutionary act by J.R. Searle's work. Searle foregrounds the role of illocutionary acts in prompting action, but does so in a manner that reduces the perlocutionary to an "effect" rather than an act.[218] In reducing the perlocutionary act merely to an effect of illocutionary speech, Searle mutes the question of authority. The presumption is that illocutionary acts succeed by their mere utterance and any consequences are a perlocutionary effect of the illocutionary act. Yet when speakers have sufficiently strong

[218] Searle, *Speech Acts*, 46-49.

authority or remarkable coercive power, as discussed in the last section, it is misleading to presume the possibility of denying or refusing the command.

Because of the prominence of Searle's work, and his reduction of the perlocutionary act, a lacuna exists in that body of literature around the notion of a command. Without such a notion, the insights from speech act theory have distinct limitations. Derrida picked out a particular consequence of this exact problem, describing the inherent problem in J.L. Austin and J.R. Searles approach as an emphasis on a general iterability that viewed infelicitous (or perhaps merely unsuccessful) speech acts as an inevitable element of speech that demonstrated the importance of context by describing specific forms of failure. In Derrida's view this ignored the reality that prior to illocutionary and perlocutionary speech types, locutionary speech held within it the capacity for infelicitous speech which made the problems confronting the speech acts Austin and Searle focused on more a problem of language itself.[219] From this conclusion Derrida extracts a notion that is significant for explaining the particular function of executive orders. Rather than relying on iterability or the ability for speech acts to be reproducible, a better focus would be on citationality, or the ability for a speech act to reference and redeploy past exercises of power even if the form changes.

In this case Derrida's argument is helpful, but must be more nuanced. In practical terms the function of executive orders is much more formalized and long standing; this question of whether language works through iterability or citationality becomes subject to a more specific debate, namely, that although the practices of communication and writing that preoccupy Derrida and Searle are universal to human enterprise, there is a practical

[219] Derrida, *Limited Inc.,* 15-19.

relation between the power afforded to the speaker and speech that drives the proper function of a speech act. To make sense of this difference requires a nuanced approach to the power of executive orders.

As discussed in the previous section, executive orders are distinctive because they have a long standing formalized tradition, have plausible and normalized if not universally accepted constitutional justifications, and have significant practical value in a manner that signing statements and presidential policy directives do not. As a result, the question of felicity that defines the debate for both sides does not apply. To the extent that executive orders will be enacted (unless contravened by Congress, the Supreme Court, or subsequent presidents) the question of the felicity of the utterance is resolved. If others are prompted to respond to the material changes that result from the executive order that poses a different question dealing with the important, but distinctive element of building support for those change proposed. If the question of felicity is set aside, in favor of a focus on how the rhetoric within an order demonstrates and operationalizes the ideological commitments of the criticism, a more productive picture is painted.

Borrowing from the notion of the perlocutionary act from speech act theory promotes appreciation of the specific relationship between speech and action. Because executive orders by their very definition fall into the category of speech that prompts the changes in material consequences, they simplify the question of the relationship between speech and action. In short, there is no space between speech and action. This insight would prompt one to infer that iterability therefore provides the simplest analytical tool for understanding how executive orders gain their power and function. Yet if there is no

disputation over the power of executive orders, then the concept of iterability is unnecessary and citationality is not particularly helpful either.

This chapter shifts the question of genre somewhat. Where previous chapters focused on analyzing speech genres by presidents, this chapter takes a distinct approach to focus on executive orders that span presidencies. Foregrounding executive orders as a genre in direct conversation with each other although they perform distinct, but normal functions. This is not an attempt to elide the difference between Presidents George W. Bush and Obama. Instead, it is a recognition that they used a long established and significant form of presidential powers similar in kind, although put to different uses. Toward that end, the rhetorical work of tracing the differences in their articulation is more important than tracing the differences in their conceptions of executive powers.

To explicate the differences between iterability and citationality becomes more significant. For executive orders that historically have served a similar function, a question arises whether they are new iterations or merely cite what has been done before. The temptation, is to argue that their tendency is toward iteration, because these documents are so similar. Instead, I contend that citation is more appropriate, because although the performance is so similar between executive orders, their ideological and political ends differ significantly. So although executive orders clearly rely on the previous uses of them the politics of their use shifts in such a manner that they work as a citation rather than an iteration.

Seizure

The most straightforward variety of executive order deployed in the terror wars was used to carry out a relatively simple action, with a long history within the executive branch. This kind of executive order is used to secure the seizure of property by persons, organizations, or countries perceived to pose a threat to the United States, its allies, or international stability. These executive orders are in so common that when a president perceives not only genuine threats, but also potential problems, these executive orders are issued as a means to directly attack the financial assets of the enemy. Incumbent in this action is the declaration of an emergency and a definition of the enemy that must be attacked. In this way, executive orders used to seize assets are a tool used to initiate hostilities attacking the economic resources of a perceived threat.

The first of the executive orders issued by the George W. Bush administration as a part of the terror wars was Executive Order 13224 "Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism." The executive order, maintaining a long standing practice for presidents using executive orders to directly attack the financial assets of perceived threats, begins with a list of citations. In keeping with previous orders by previous presidents, the list of citations includes the "International Emergency Economic Powers Act," the "National Emergencies Act," (NEA) and section 301 of Title 3 of the United States code. Additionally, the first section cites a number of resolutions and norms established by the United Nations.

The references to these acts by the United States government are significant. The "International Emergency Economic Powers Act" (IEEPA) was noteworthy in that it

gave the President the authority, during times of emergency, to regulate commerce. This power, traditionally given to Congress from the explicit text of the Constitution, was originally given to the President during times of emergency beginning with the Trading With the Enemy Act (TWEA) of 1917. This act, written during the First World War, sought to give the President the ability to prevent U.S. economic support for foreign powers believed to be antithetical to U.S. interests during times of war. In 1977, fearing the expansive use to which the TWEA had been put, Congress opted to create a new law, very much in line with the thinking behind the War Powers Resolution, that the executive branch needed greater control.[220] The IEEPA resolved this problem by positing that the threat must be unusual, extraordinary, and renewed annually, while limiting the presidential action to blocking transactions unless a direct attack was made against the United States. Falling under the aforementioned National Emergencies Act, the IEEPA provides the authority for the president to take action under conditions of their choosing defined by a temporary state of national emergency.

With this set of legal citations established, George W. Bush included citations from the United Nations that laid the basis for an objection against support for terrorism found in international law. These citations themselves were remarkable because they are not a permanent fixture in executive orders issued by other presidents, nor is there a reason to believe them necessary for the executive order to have its desired effect. Nonetheless, the references to United Nations Security Council Resolutions 1214

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[220] "UNITED STATES: SUPREME COURT OPINION IN REGAN v. WALD (Treasury Regulations Preventing Travel to Cuba; Trading with the Enemy Act)." *International Legal Materials* 23, no. 4, (1984): 4-6.

(addressing the civil war in Afghanistan), 1267 (demanding the Taliban turn over "Usama Bin Laden"), 1333 (recalling all previous resolutions and ending any support for the Taliban government), and 1363 (establishing a mechanism to moniter 1333) provides and international basis and support for the George W. Bush administration's decision 12 days after the September 11 attacks to tie the blocking of property of people who support terrorism to the government of Afghanistan.

The subsequent section, in keeping with similar executive orders takes on the first persona to describe a series of findings. As George W. Bush posits:

> I, GEORGE W. BUSH, President of the United States of America, find that grave acts of terrorism and threats of terrorism committed by foreign terrorists, including the terrorist attacks in New York, Pennsylvania, and the Pentagon committed on September 11, 2001, acts recognized and condemned in UNSCR 1368 of September 12, 2001, and UNSCR 1269 of October 19, 1999, and the continuing and immediate threat of further attacks on United States nationals or the United States constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States, and in furtherance of my proclamation of September 14, 2001, Declaration of National Emergency by Reason of Certain Terrorist Attacks, hereby declare a national emergency to deal with that threat. I also find that because of the pervasiveness and expansiveness of the financial foundation of foreign terrorists, financial sanctions may be appropriate for those foreign persons that support or otherwise associate with these foreign terrorists. I also find that a need exists for further consultation and cooperation with, and sharing of information by, United States and foreign financial institutions as an additional tool to enable the United States to combat the financing of terrorism.[221]

Interestingly, this approach makes the determination personal. Of course, read literally this could be interpreted as a personal determination on the part of George W. Bush, but more realistically, it is a finding of the executive branch as a body, rather than a finding

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[221] Bush, George W. *Executive Order 13224-Blocking Property and Prohibiting Transactions with Persons who Commit, Threaten to Commit, or Support Terrorism*. 25 Sept, 2001. Federal Register 66, no. 186, (2001).

of the individual person of George W. Bush. The function of making the finding personal is to invest the power of the executive branch within the body of the president, making the order a product of the office of the president, satisfying the text of the Constitution, while maintaining the utility of a far reaching and diverse executive branch. Read this way, the order is of course personal to the president, but the president stands in for the broader authority and ability invested in the executive branch.

The finding described by the Bush administration takes place in the context of a declaration of an emergency. For such an executive order to be issued, the President must be able to describe conditions that require the normal means for determining economic policy towards a population to be suspended in favor of quick sovereign action. The declaration of the emergency authorizes the actions taken by the President to address the threat. Inherent in such a declaration is the transformation of a national security threat into an economic form, described here by the financial foundation of terrorism. This move to link the economic and security interests of the United States under the executive branch is an important move for both the practical efforts to directly attack the financial capabilities of the enemy, but also the symbolic designation of the enemy as such.

There are two other findings of equal interest. First, the finding that the attacks are both recognized and condemned in United Nations resolutions, one of which predates the attacks. This finding, although not significant for the United States to the extent that our law is not necessarily bound to the resolutions of the United Nations, is significant in that it works to situate the United States in relation to the international system of law

designed to limit and ideally eradicate attacks of this type. In this way, the executive order is not just an independent action, but an action in line with the authority of the United Nations even without United Nations support. This move indicates a sensitivity to critique by the United Nations of the United States taking unilateral action. By couching the finding in these terms articulating such a critique becomes more complicated, and limits the possibility for a negative international response.

Second, the finding emphasizes the importance and pervasiveness of financial support for terrorist organizations. This insight is not new, but does point towards a distinct strategic approach to the problem of terrorism. Where the military response remains a possibility, it is a possibility contingent on Congressional support. While that support had already been expressed under the auspices of the Authorization for the Use of Military Force Against Terrorists (AUMFAT) issued five days earlier this executive order provided the President with the ability to take direct action unilaterally and immediately without reliance on further congressional support.

Such support was not lacking. The AUMFAT had passed with an incredibly low level of dissent. Nonetheless, President George W. Bush, in his finding, is directing the audience to an area where he has both statutory and constitutional authority to take unilateral action. This is not an approach that is altogether unique or distinctive, other presidents had issued similar orders. Yet it points toward an inherent tendency in the presidency to prefer unilateral and direct action within the bounds afforded. That this finding proceeds to argue that the United States must cooperate with foreign financial institution points toward the need to focus on the privileged relationship between the

presidency and foreign policy in the terror wars. Put plainly, the findings used in this executive order, in a hallmark of the genre, situate the problem perceived by the President as a justification for action against potential dissent from Congress. The nature of the finding outlines the need for presidential action, and seizes the exigency as a means to move before Congress acts. In this way, executive orders to seize assets are a preemptive move to assert a particular field of action for the President.

Following this finding, a number of specific commands are issued. Each command is given a distinct numerical title as a "section." The first two of these sections block any attempt at financial engagement with any persons or entities listed on an attached annex to the order. Similarly, vague and open ended commands limit exchange with persons who, for instance, "pose a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States." The question of inclusion on this list is itself important, but the wording of the two relevant sections is sufficiently vague that there is little indication, beyond decisions by the executive branch, of what would qualify one for inclusion on the list of persons or entities with whom financial transactions would be blocked absent decisions made on a case by case basis by executive branch leaders such as the Secretary of State.

In an attempt to add some clarity, another section was added that attempted to define the relevant terms. The only operative term that is defined is a meaningful one, in that it would become a key definition in the War on Terror. The definition provided for terrorism was:

> (d) the term "terrorism" means an activity that —
> (i) involves a violent act or an act dangerous to human life, property, or infrastructure; and
> (ii) appears to be intended —
> (A) to intimidate or coerce a civilian population;
> (B) to influence the policy of a government by intimidation or coercion; or
> (C) to affect the conduct of a government by mass destruction, assassination, kidnapping, or hostage-taking.[222]

This definition, on its own and without political context, presents itself as remarkably neutral. Couched in terms of the previously mentioned finding this definition takes on a more specific function. The definition applied here is not a general one, but rather is tied to the finding about the persons who carried out the attacks. So although the definition provided here could be seen as neutral if observed in a vacuum, in practice is tied to specific entities and individuals such that rather than functioning as a definition that would determine the applicability of a sanction, it is a justification for that sanction. In so doing, the rhetorical tail wags the dog prompting a tendency to view the problem of terrorism in relation to September 11, rather than in terms of a general standard, which makes sense in the particular case of the individuals and entities directly implicated in the attacks on September 11. Yet as a result of this executive order, the Secretary of State and Secretary of the Treasury were empowered to create a list of "specially designated persons" who would also be subject to sanction. That this list was influenced by the context in which terrorism was defined is readily demonstrated by the make-up of the list, which is overwhelming made up of persons with traditionally Middle Eastern names.[223]

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[222] Bush, George W. *Executive Order 13224-Blocking Property and Prohibiting Transactions with Persons who Commit, Threaten to Commit, or Support Terrorism*. 25 Sept, 2001. Federal Register 66, no. 186, (2001).

[223] To see the list, visit: https://www.treasury.gov/ofac/downloads/sdnlist.pdf

The genre of executive orders used to seize, freeze, and block the exchange of funds are of a particular significance because they are capable of being applied to individual persons. This distinctive trait is made more intriguing by the ability of the executive order to set in motion institutional processes that escape the original intent of the order. In this case, the specially designated persons list used to seize assets has continued to be used in a more expansive manner than simply taking funds from those with clear and direct ties to September 11, but rather created a list of persons whose assets were seized under the auspices of the threat of terrorism, now numbering over 15,000 entries.

These commands function as administrative discourse. They direct agencies to act in a very specific and particular manner that is strictly defined by the will of the President. Within the conceptual framework of the unitary executive, this prerogative is part and parcel of governance. Yet such a framework overlooks the particularity of the power exercised in this instance. By claiming the ability to target specific persons the presidency is uniquely empowered to act on a micro scale that is difficult to account for in terms of constitutional norms.

Subsequent to the publication of executive order 13224 and the creation of the list, the responsibility for maintaining and administering the list was transferred to the Department of Homeland Security from the Office of Management and Budget in executive order 13284. That this transfer was made provides two lessons. The first is simple, that this list was understood to constitute part of the national security apparatus of the United States. In transferring responsibility for the list to the Department of

Homeland, security a change was made that was not only symbolic, but gave the list a greater reach by placing it under the responsibility of a body that was institutionally connected to the other departments and agencies responsible for various elements of national security with greater capability to enforce the list and track persons named in it.

The second lesson is that, even as the Department of Homeland Security was created very quickly following the September 11 attacks as the "Office of Homeland Security" a mere three weeks later, the list and practice of seizure began even more quickly, two weeks later. This demonstrates how the George W. Bush administration (and presidents in general) perceived the function of executive orders to seize property. The ability to seize, block, or freeze property provides the president with the ability to take unilateral, direct, and meaningful action that does not rely on Congress and is only occasionally challenged by the Supreme Court. Even in those cases when the Supreme Court has questioned this authority, the decisions have focused on the command against notifying specially designated nationals that they are on the list prior to seizure in executive order 13224.[224] Although certainly demonstrative of the ability of the legal system to engage with executive orders (a power which is notably lacking in the other presidential powers described in this project) it is telling that the logic and legitimacy of presidential action is not questioned, merely the means by which the action is performed. The power to seize assets then is recognized as a public, powerful, and relatively unimpeachable means for the President to intervene against perceived threats.

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[224] "KindHearts Type chapter title (level 2) 2 for Charitable Humanitarian Development, Inc. v. Geithner *et al.*". ACLU. November 22, 2011.

Toward that end, the George W. Bush administration would make issuing such executive orders a standard part of the response to emergent or perceived emergent threats over the course of the War on Terror. Subsequently executive orders would be issued seizing property from a number of persons perceived to be interfering with the reconstruction effort in Iraq in executive orders 13315 and 13438, weapons of mass destruction proliferators in executive order 13382, and claimed temporary ownership of property belonging to the Iraqi government in executive order 13290.

What remains consistent about these executive orders is the reliance on a prototypical form, including a finding, which provides a particular context justifying the actions taken by a president. This finding functions much like the preamble to a piece of legislation. It outlines the context and scope of the intended policy while articulating a set of justifications for action. In so doing it provides a rhetorically rich framing for how an executive order is justified that makes clear how the power of the executive branch is able to intercede without relying on a specific power granted by one of the other branches.

This particular type of executive order has remained a central part of the presidency under the Obama administration. Although President Obama did not have the same reasons as the George W. Bush administration, because there was no need to seize assets in preparation for a protracted conflict, the Obama administration continued to exercise this power for the purpose of taking direct action to intercede against perceived threats, not only to the United States, but against international stability. The shift toward an international view was not unique, George W. Bush had issued executive orders not

specifically tied to the terror wars that served a similar function. Yet for Obama, in issuing executive orders, an international perspective became more pronounced.

An example of this international perspective can be found in three executive orders from the Obama era that provided a new blueprint for how they could be used. The first of these orders sequentially is executive order 13566 issued on February 25, 2011. As a part of the Arab Spring revolutions, Libya had become a particularly graphic example of violence, as the Qhadafi regime had used military force to quell the uprising. In response the United States, and in particular President Obama, faced a challenge to the existing role of the United States in world affairs. Faced with a country using extreme force against its own people, there was a strong temptation to intervene militarily to assist in the overthrow of the Qhadafi regime and establish a new government. Indeed, the use of force against civilian dissent had been a part of the justification for the use of force in Iraq and Afghanistan by George W. Bush.

Fearing the possibility of a similar set of problems created by an invasion with the aim of installing democracy as had been seen in Iraq, the Obama administration set out on a different course, relying on a partnership with NATO countries using air strikes to eliminate the ability of the Libyan army to attack dissenters.[225] Notably, in this first "new war" for the Obama administration, there was little interest in seeking congressional approval or support. Indeed, prior to the strikes, only congressional leaders had been orally informed of the intention to carry out air strikes, as the Obama administration did not perceive a need for congressional approval.[226]

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[225]Hendrickson, *Obama at War: Congress and the Imperial Presidency*, 55-56.
[226] Hendrickson, *Obama at War: Congress and the Imperial Presidency*, 56-57.

Yet Congress could hardly claim to have been taken by surprise that the use of force was in the offing. Executive order 13566 issued three weeks before the airstrikes began on March 19, 2011, strongly indicated that President Obama intended to intervene against the attacks on civilians by the Qhadaffi regime. As the finding section of the executive order states:

> I, Barack Obama, President of the United States of America, find that Colonel Muammar Qadhafi, his government, and close associates have taken extreme measures against the people of Libya, including by using weapons of war, mercenaries, and wanton violence against unarmed civilians. I further find that there is a serious risk that Libyan state assets will be misappropriated by Qhadafi, members for his government, members of his family, or his close associates if those assets are not protected. The foregoing circumstances, the prolonged attacks, and the increased numbers of Libyans seeking refuge in other countries from the attacks, have caused a deterioration in the security of Libya and pose a serious risk to its stability, thereby constituting an unusual and extraordinary threat to the national security and foreign policy of the United States, and I hereby declare a national emergency to deal with that threat.[227]

This finding is remarkable in two different, but mutually reinforcing elements. The first, which would become a constituent element of executive orders going forward, foregrounds the concern for the threat posed to the Libyan people by the regime. Focusing on the threat posed to the Libyan people posits the United States intervention on humanitarian grounds, which implies a division between the Libyan people and the government. Action taken by the executive branch, to freeze funds, then becomes an attempt to act on behalf of the Libyan people. Notwithstanding the claim, at the end of the finding, that the continued destabilization of Libya posed a threat to the United States.

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[227] Obama, Barack. *Executive Order 13566-Blocking Property and Prohibiting Certain Transactions Related to Libya*. 2 March, 2011. Federal Register 76, no. 41, (2011).

This threat, as time would tell, was a genuine one, most famously expressed in the attacks against the U.S. diplomatic compound and CIA annex in Benghazi a year later. Subsequently, the instability in Libya would result in the growth of rival militias, some of which aligned themselves with the Islamic State. Nonetheless, at the outset and subsequently, threats to the domestic security of the United States remained abstract and immaterial. The finding then, perhaps relying on such an abstract possibility of potential future threats, is more concerned with finding a preventative solution by providing the conditions for stability in Libya.

The important term, and second remarkable element in the finding is the concern over misappropriation of assets by the Libyan regime. The circumstances surrounding the instability in Libya are distinctive for the Obama administration. The Qhadafi regime had ruled Libya for over 40 years, with remarkable staying power despite occasional border conflicts and attempted coups. The revolution and Obama administrations intervention effectively on the side of the revolution, functioned as a direct intervention against an established government. In seizing the assets of the government to prevent "misappropriation," the Obama administration was attempting to forestall the possibility that as the regime collapsed resources that the Libyan people would need to reconstruct their government might be lost with Qhadafi. Envisioning a scenario where Qhadafi or other members of the government took (primarily financial) assets with them as they left, the Obama administration sought to limit the damage by taking unilateral action.

These two elements of the finding reinforce each other to create a coherent picture of the future of Libya. The Obama administration at the time executive order 13566 was

released foresaw the possibility of instability stemming from the collapse of the Qhadafi regime and the need to prevent the theft of assets from the Libyan people. Toward that end, this executive order sought to preemptively shape the conditions facing the Libyan people by protecting assets needed to rebuild the country. Problematically, that the funds were seized was not independently sufficient to satisfy the needs for a transfer of power, and as time would tell, air power itself was not sufficient.

Executive order 13566 realistically did not prevent or significantly impact the trajectory of the events in Libya. Certainly, in terms of determining whether the Qhadafi regime would fall, the direct application of force through airstrikes played a much greater role in the overthrow of the government (and the ensuing instability). What this order did do, and what makes it a particularly fertile artifact for rhetorical analysis, is make clear how the United States perceived the revolution. It was a revolt by the people against a government using "wanton violence" to suppress dissent. It was a revolution that would likely trigger instability and might not reach a quick conclusion. Of importance, it was a revolution that could pose a threat to the United States that constituted a national emergency but was not sufficiently severe to justify a large scale military intervention to rebuild the country.

This executive order functions as a part of an alternative approach to foreign policy grand strategy. In a departure from the Bush doctrine that relied on the preventative use of overwhelming force to prevent the emergence of threats of which the seizure of property was a part, Obama followed an alternative approach designed to manage and limit the emergence of threats through more measured uses of force that

included the seizure of assets. This more measured response foregrounded international stability as an element of U.S. national security, but relied on a warrant that emphasized the impacts of instability on citizens of foreign countries. Put plainly, the definitive shift in the Obama administration was toward an international perspective that relied on a more measured response by the United States emphasizing stability rather than an investment in a particular form of governance.

This would not be the last executive order issued seizing assets in Libya. Executive order 13726 issued near the end of the Obama administration on April 19, 2016, reaffirmed the findings of executive order 13566 in the context of the fraught and fragile transition to democracy. Yet what is interesting in this executive order is less the emphasis on seizing property, than on the additional order that persons contributing to instability in Libya be banned from entry to the United States. This order foreshadowed the immigration bans recently inaugurated through executive order under President Trump, which have banned entry to the United States by persons from countries afflicted by instability. Although the order given by Trump is more far reaching and does not target specifically those contributing to instability, such a ban has at least a partial precedent in the Obama administration appears to be undeniable.

The executive orders seizing assets in Libya are demonstrative of a distinct approach to foreign affairs that decenters the focus on U.S. national security. I use the term "decenters" here to indicate that U.S. national security was not ignored, and indeed was the ultimate justification for action. Nonetheless, the executive orders addressing Libya were significant in that they foregrounded the stability and security of other

countries as a justification for U.S. action. This concern with international stability became a personal mark on the use of executive orders by the Obama administration.

The second of these orders sequentially is executive order 13611 from May 16, 2012. This executive order froze and seized assets from persons and organizations threatening the peace, security, and stability of Yemen. Prior to this executive order the United States had genuine problems stemming from Yemen. It was off the coast of Yemen that the U.S.S. Cole had been the target of a terrorist attack in 2000. Subsequently Yemen had been recognized by the United States as a potential source of terrorist activity. In 2010, as a part of the Arab Spring revolutions, the government of Yemen had been gradually destabilized and delegitimized. Ultimately on November 24, 2011, an agreement was reached mandating a transfer of power from President Ali Abdullah Saleh, to a unity government led by Abd Rubbuh Mansur Hadi with elections to be held shortly for a new president.[228] This transition was not successful, within a few years Hadi would have to flee the capital of Sana'a and the country sank into civil war.

Alongside the failed transition of power Al Qaeda in the Arabian Peninsula (AQAP) experienced a period of rapid growth in both membership and capability, firmly establishing itself as an organization that could pose a genuine threat to the United States. Even as the revolution had been in its early stages, the United States had been using drones to patrol the skies over the country and practice "targeted killing" of persons

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[228] "Agreement on the Implementation Mechanism for the Transition Process in Yemen in Accordance with the Initiative of the Gulf Cooperation Council (GCC)." Draft May 11, 2011. Signed November 24, 2011.
http://peacemaker.un.org/sites/peacemaker.un.org/files/YE_111205_Agreement%20on%20the%20implementation%20mechanism%20for%20the%20transition.pdf

deemed to be terrorist threats. The most well publicized examples were the killing of U.S. citizen Anwar Al-Awlaki on September 30, 2011, and his 16 year old son Abdulrahman Al-Awlaki on October 14, 2011. The practice of targeted killing using drones would continue for the duration of the Obama administration and would be supplemented by intelligence gathering and special operations efforts in support of military action by Saudi Arabia to stabilize the country.

By the advent of executive order 13611 the transition of power in Yemen was very much in doubt. Despite the heralded agreement to transfer power, there was very little faith in the political process to succeed on its own merits. This lack of faith was manifested in an ongoing insurgency that sought to destabilize the newly created unity government. In an attempt to undermine external financial support for this insurgency, executive order 13611 was issued.

The finding in this executive order points toward an international interest and consciousness on the part of the United States:

> I, Barack Obama, President of the United States of America, find that the actions and policies of certain members of the Government of Yemen and others threaten Yemen's peace, security, and stability, including by obstructing the implementation of the agreement of November 23, 2011, between the Government of Yemen and those in opposition to it, which provides for a peaceful transition of power that meets the legitimate demands and aspirations of the Yemeni people for change, and by obstructing the political process in Yemen. I further find that these actions constitute an unusual and extraordinary threat to the national security and foreign policy of the United States, and I hereby declare a national emergency to deal with that threat.[229]

[229] Obama, Barack. *Executive Order 13611-Blocking Property of Persons Threatening the Peace, Security, or Stability of Yemen.* 16 May, 2012. Federal Register 77, no. 97, (2012).

That the finding begins with an emphasis on "Yemen's peace, security, and stability" as a justification for the executive order is telling. In a significant departure from the normal focus in the George W. Bush executive orders on findings that foreground threats to U.S. foreign policy with international stability as a partial justification; this executive order foregrounds the question of international stability with its implications for U.S. security as a partial justification. Framing the finding in this way presents a different view of how the executive order can be used. Rather than simply relying on the established norms emphasizing U.S. security, this executive order gestured towards an alternative function that uses the power of the presidency to directly address problems facing other countries independent of other policy mechanisms, rather than using the power of the presidency as a supplement to ongoing military action.

In apparent contradiction to the claim made in the paragraph above, the concluding thought in the finding is that instability in Yemen is a concern for U.S. national security. This concern was not small; AQAP in particular posed a substantial threat. Yet it is interesting that the order also freezes property of members of the Yemen government. Also, the executive order at no point mentions terrorism. If this executive order was foregrounding direct threats to U.S. national security one would presume that these terms, or at least explicitly outlining these threats would be a part of this executive order. In the absence of such language, the proper interpretation is that while the Obama administration realizes the possibility for future threats arising from Yemen, those threats have more to do with the problems arising from Yemen's instability giving rise to new threats than those posed by the revolution itself.

In this way, the Obama administration is articulating a different vision of how to respond to the conditions facing the world precipitated by the terror wars. Rather than coupling presidential direct action with large scale military action, the Obama administration is pursuing an alternative strategy that utilizes a much more limited scale of military action, defined by the use of drones and a very small military footprint, coupled by direct action to influence events in other countries. This approach, uninterested in the nation building processes of the George W. Bush administration, seeks to support international stability without committing large elements of the U.S. military to impose a particular form of government.

Executive orders designed to freeze assets were not only viewed as a means to preserve or promote international stability. They also served an important function as a means to directly enact U.S. foreign policy in a public manner. The most straightforward of these executive orders as a series of orders establishing sanctions against the government of Iran. These executive orders did include a finding, but in a return to the practices of the George W. Bush administration, these findings were generally shorter and relied on the practice of citation. These citations generally referred either to a source of authority for the order or referred to a specific demand for executive action based in either international or domestic legislative processes.

The first of this series was executive order 13553. This executive order, titled "Blocking Property of Certain Persons with Respect to Serious Human Rights Abuses by the Government of Iran and Taking Certain Other Actions," was published without a substantial finding. Instead, it began by citing potential sources of authority including,

"the International Emergency Economic Powers Act (50 U.S.C. 1701 *et. seq*.), (IEEPA), the National Emergencies Act (50 U.S.C. 1601 *et seq*.), the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (Public Law 111-195) (CISADA), and section 301 of title 3, United States Code, and in order to take additional steps with respect to the national emergency declared in Executive Order 12957 of March 15, 1995," taken as a collection, this list of references gave President Obama a broad authority to use economic means to achieve foreign policy goals. The express grant of authority in CISADA to address Iran notwithstanding: the IEEPA grants the president the authority to regulate commerce to address unusual and extraordinary threats to national security, the National Emergencies Act grants the president the authority to declare emergencies while reporting annually to Congress, section 301 of title 3 in the United States Code empowers the president to dictate to agency or department heads policy changes authorized for presidential action, and executive order 12957 issued by President Clinton declared a national emergency around the threat posed by Iran.

The reliance in this order on a list of citations to generate diverse and reinforcing basis for authority has two functions. First, it satisfies the legalistic requirement in the IEEPA that the president articulate a threat and declare a national emergency. Second, it situates the executive order within a legacy of action that provides a sense that the president is acting within the accepted norms for exercising executive power. Notably, this same set of justifications would be included (with some additions to account for specific legislation such as the 2012 National Defense Authorization Act) in executive orders 13590, 13599, 13622, and 13628. This collection of executive orders and the

shared justifications within them demonstrate the limitations of a requirement for justification. Where the requirement is satisfied in one manner in the first case, the presumption resides with the president for subsequent attempts at justification.

Ultimately, the various executive orders do not represent a rich or insightful text for analyzing the perception of Iran as a threat for the Obama administration. The critical insight found in these executive orders is that they depart from the norm of articulating a finding to justify the action which is taken. One of the more difficult elements of genre theory to articulate is explaining how a particular case (or in this case of collection of them) that deviates from the norm fits within the genre. What the executive orders dealing with Iran demonstrate well is the function of citationality.

Without relying on the norm of rich justification in the finding these executive orders still operated effectively in that they resulted in a policy change. To say that this was a result of the iterability of the executive order would be to infer that all executive orders work because of their past successes. That approach would imply that the correctness of a finding or the effectiveness of an action would amplify the legitimacy of an executive order. By this moment in the history of their use, such a claim is not accurate. Executive orders work because the power of the executive to command action has come to be acknowledged as legitimate.

Instead, executive orders in general, and those issued against the government of Iran in particular work through citationality. They cite past executive orders and particular grants of authority to legitimate the action taken, but not as a demonstration of how the executive order is reiterating past action. Instead, these are appeals to authority

that are used to create legitimacy for new action. Executive orders also rely on citationality in another way.

In issuing executive orders without findings, the Obama administration would, under other circumstances, have been operating on infirm ground. To the extent that executive orders are public they are subject to greater scrutiny, and without a finding that scrutiny could prove to be severe. Yet in the case of Iran, persistent public fears about the risk of a nuclear Iran made a finding unnecessary. The threat was publicly acknowledged from almost all sectors including the Congress and the U.S. public. In this light, citationality works as a means to explain why without a finding the executive order is nonetheless operable. It responds to the acknowledged public condition in a manner that legitimates the action taken by the president, even if the action may prove to be unpopular.

This also explains how a genre analysis explains the function of this particular case. The executive orders issued against Iran are distinct in they do not feature a finding on the nature of the threat posed by Iran. Although as a genre such a finding would be expected, the particular circumstances surrounding the perception of Iran as an ongoing threat meant that such a finding was not necessary for the executive order to function. In this instance, the Obama administration took advantage of a contingent set of circumstances in drafting an executive order that had a distinct wording. That this did not end the practice of including a finding in the executive order is demonstrative of the power of the form in defining the practices of genre. Normal use would not permit such an approach, but in the case of Iran, a finding was unnecessary.

This is perhaps best explained by the public perception and response to Obama's action on Iran. Despite issuing no less than five executive orders seizing, freezing, and blocking assets in addition to levying sanctions on Iran, there remained a narrative that Obama was not strict enough. In this climate, the actions taken by the Obama administration were not subject to substantial scrutiny because for those seeking to critique the Obama administration for being lax with Iran, questioning executive orders taking direct action against Iran would be counterproductive. For those seeking to critique the Obama administration for not taking a more conciliatory approach, the executive orders were on face legitimate, but nonetheless undesirable. Citationality, in this case the unspoken but obvious inference that Iran posed a serious potential threat as a nuclear proliferator with a weak human rights record, allowed the Obama administration to exercise executive power without the more robust justifications required to address less well publicized or understood policy problems.

The two distinct types of executive orders issued by the Obama administration to materially constrain perceived threats as well as the executive orders issued by the George W. Bush administration as a part of a broader military effort pose a serious problem for democracy. Because they rely on a practice of citationality to gain legitimacy, they limit the grounds for dissent. Although they are distinctly public, the legacy of their use and the ability to rely on external authorization for action renders the act of the executive order unimpeachable.

To the extent that they can and often do respond to public concerns, as in the case of Obama's response to Iran, they have a representative element. Yet this element is

strictly circumscribed, as the public and Congress lack the means to question the legitimacy of presidential action. Instead, the response is limited to the nature of the action, which shifts the discussion from a constitutional question, which could limit the power of the presidency, to a political question which is more fraught and lacks the conditions of possibility for the kind of consensus necessary to limit presidential action.

Executive Control of the Military

A distinct genre of executive order that was not unique to the George W. Bush administration, but which did significantly influence the terror wars is executive orders issued to control the United States military. These orders are substantively distinctive from orders issued to seize assets in that they lack a finding. Instead, they cite either statutory authority or reference general but relatively widely held understandings of the role of the executive branch to assert the right to presidential action. These orders, then, provide a hard case for rhetoricians in that they lack the more rich language used to describe a problem that offers a toehold for rhetorical analysis.

Nonetheless, rhetoricians offer important insights into executive orders. The easy answer is that when presidents cite these general understandings of executive branch power to control the military, the framing of that power provides an insight into what the political and philosophical commitments of the presidency are. The harder argument, which will be a primary focus of this section, is how the practice of citationality produces a meaning for presidential action that goes beyond statutory authority.

As a distinct sub-genre, executive orders used to control the military tend to be less formalized than executive orders used to seize assets. Where the authority to seize

assets has a basis in repetitive practice, the conditions and methods by which the President enters and pursues military conflict are in substantial ways less rigorous. Thus, executive orders issued for this purpose tend to be tailored more strongly to the situation that the executive branch is attempting to intervene against. In the crafting and tailoring of these orders, the perception of the President strongly colors the meaning in the order.

The first of these executive orders issued by the George W. Bush administration was issued very quickly following the attacks on September 11, 2001. Executive order 13223 was issued calling into "ready reserve" the armed forces. The authorization offered for this action are:

> By the authority vested in me as President by the Constitution and the laws of the United States of America, including the National Emergencies Act (50 U.S.C. 1601 *et seq.*) and section 301 of title 3, United States Code, and in furtherance of the proclamation of September 14, 2001, Declaration of National Emergency by Reason of Certain Terrorist Attacks, which declared a national emergency by reason of the terrorist attacks on the World Trade Center, New York, New York, and the Pentagon, and the continuing and immediate threat of further attacks on the United States, I hereby order as follows.[230]

The statutory sources of legitimacy here are similar to those referenced for the executive orders issued to seize foreign assets. This statutory authority is in some ways self-referential, hence the need for a proclamation, issued on the same day, declaring a national emergency. By declaring the authority to set into motion the mobilization of the armed forces, this executive order functions as the second step in a two-part maneuver where the executive is able to use statutory authority to claim a more expansive authority. Ultimately, despite the potential symbolic potential of such a move, it is

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[230] Bush, George W. *Executive Order-13223-Ordering the Ready Reserve of the Armed Forces to Active Duty and Delegating Certain Authorities to the Secretary of Defense and the Secretary of Transportation*. 18, Sept. 2001. Federal Register 66, no. 181, (2001).

somewhat inconsequential. As discussed in the previous chapter, the privileged relationship between the executive branch and foreign policy makes the claim to Constitutional authority sufficient until a meaningful challenge is brought. This claim is doubly true when it comes to the mobilization of the military, which falls under the authority of the president as commander in chief.

What is more telling is the contextual explanation for that statutory authority. This contextual explanation relies first on the specific example provided by the September 11 attacks, referenced by their particular instances with the notable exclusion of flight 93 which crashed in Pennsylvania but was presumptively directed toward the White House.[231] The second explanation is the threat of further attacks against the United States. This threat is perhaps the most publicly significant. While the attacks on September 11 were a major attack on the psyche of the U.S. public and leadership, the threat of further attacks which could be even more devastating was magnified by those attacks. Calling on the potential of such a threat, even if unnecessary for the moment at which the administration intervened, promoted a sense of vulnerability that helped justify the actions taken.

The order itself committed to two major actions which would place the United States on a war footing. The first of these was a section that suspended "laws for promotion, involuntary retirement, and separation of commissioned officers; end strength

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[231] "'We Have Some Planes'". 9/11 Commission Report. National Commission on Terrorist Attacks Upon the United States. 2004. Retrieved Apr. 30, 2017.

limitations; and Reserve component officer strength limitations."[232] The second was a section that authorized the Department of Defense to increase the number of personnel on active duty. Both of these sections were geared towards scaling up the combat capacity of the United States. Such an action does not make sense when the aim of the terror wars was intended to function as limited interventions against the organization responsible for the attacks. It does make sense when the intention is a large scale intervention not just against the organization, but the countries that have provided material support for these organizations.

Taken as a whole, this executive order points towards a broader claim for executive power in decision making. It argued for and initiated a broad grant of authority for control over the military. This much is not constitutionally, at least, controversial. What is controversial is the consequence of such a broad authority. Without necessarily growing the size of the Department of Defense and the armed forces, this executive order was written in a manner which increased the effective combat size of the United States military. In this way, the George W. Bush administration was able to prepare the military for a much larger scale conflict without raising the ire of the public.

This executive order fits within the historical parameters of orders issued for the purpose of mobilizing the military. In that way it is not unique from previous orders issued by other presidents. Yet what it demonstrates well is the ability of executive orders to provide greater authority and ability for the executive branch to exercise control over the military. Even though this order does not demonstrate the sort of ideological

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[232] Bush, George W. *Executive Order-13223-Ordering the Ready Reserve of the Armed Forces to Active Duty and Delegating Certain Authorities to the Secretary of Defense and the Secretary of Transportation*. 18, Sept. 2001. Federal Register 66, no. 181, (2001).

and political commitment that typically incites rhetorical analysis, the language used here is significant. Rhetorical analysis demonstrates the nature of the constitutional and political problem at the outset of the terror wars. Relying on self-referential grants of authority, rather than external legitimation, the George W. Bush administration was able to place the military on a wartime footing.

The notion of self referentiality in regard to mobilizing the military is a distinct problem posed to the war powers resolution. By operating in a self referential manner, the George W. Bush administration was able to elide the most dramatic elements of a drift towards war by working within the existing military establishment. Although this particular problem cannot be overstated, in the particular case of the terror wars rather than potential future conflicts, the drift towards war was sufficiently obvious although the level of potential harm was relatively small as the public had good cause to believe war was coming and there was no lack of knowledge. The question of self referential authority was more potent in another arena. Namely, the treatment of enemy combatants in the terror wars.

As discussed in the chapter on signing statements, the question of treatment of enemy combatants was a fraught one for the U.S. public and the George W. Bush administration, especially in the wake of the leaks of images depicting torture at Abu Ghraib. That chapter dealt with the use of signing statements to defend the use of enhanced interrogation and indefinite detention, noting that signing statements were a semi-secretive means of sustaining a status quo that had previously been defined using internal bureaucratic means within the executive branch. Problematically, in the wake of

the signing statement issued following the passage of the Detainee Treatment Act in December 2005, the legal status and treatment of detained persons remained vague because the signing statement did not render a determination on those issues, reserving for the President the authority to render decisions on a case by case basis. As a result, the public concern over the treatment detainees and congressional frustration over the presidential circumvention of legislation remained persistent problems. A solution was offered by Congress in the Military Commissions Act of 2006 (MCA), which provided that military commissions would be used to try enemy combatants. Initially proposed to Congress by the George W. Bush administration in the wake of the Supreme Court's ruling in *Hamdan v. Rumsfeld*. In that ruling, the majority decision held that the president lacked inherent authority derived from the Constitution to declare the status of combatants and lacked an explicit writ from Congress to give the president such authority.[233] The Military Commissions Act then provided a solution by codifying in Congressional legislation the findings of the George W. Bush administration in a military order from November 2001 while modifying the Detainee Treatment Act to be more amenable to the aims of the Bush administration.

In a turn towards a more public means of addressing this problem two executive orders were issued to enact the legislation made by Congress. The first of these, executive order 13425, was issued on February 14, 2007. This executive order was issued to create the military commissions which would be responsible for trying, as the order termed it, "unlawful enemy combatants." This term, defined in the U.S. Code as a part of the Military Commissions Act of 2006, meant:

[233] "Hamdan v. Rumsfeld." Oyez, https://www.oyez.org/cases/2005/05-184. Accessed 4 May. 2017.

> (i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or
> (ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.[234]

This definition notably identifies specific organizations as unlawful combatants, namely Taliban, al Qaeda, or associated forces. In singling out these organizations the Military Commissions Act made clear who the prominently concerned parties were. This act was intended specifically to deal with the ongoing conflict in Afghanistan against both al Qaeda and the Taliban and the conflict in Iraq. The greater concern at the time was the conflict in Iraq due to the complexity of the insurgency in that country that included a large number of irregular militants. Despite this focus the act also afforded the possibility of other individuals to be determined to be unlawful enemy combatants based on the outcome of a separate tribunal process demonstrating a degree of flexibility.

That an unlawful combatant is defined in relation to a lawful combatant is also significant. A lawful combatant is defined as:

> (A) a member of the regular forces of a State party engaged in hostilities against the United States;
> (B) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or

[234] U.S.Code (2006) Title 10, Subtitle A, Part II, Chapter 47A, Subchapter 1, Section 948a.

> (C) a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.[235]

This definition by contrast emphasized the lawful status of the combatant defined by the relationship to a state. The relying on a contrast defined by the state is significant here is politically significant. Because the United States had overthrown the Taliban regime as the government of Afghanistan, and because the Hussain government in Iraq had also been overthrown, the insurgents captured in Iraq and Afghanistan, even if they purported to be engaged in organized resistance, lacked a legitimate state to claim as their own. For practical purposes this made it much less likely that any person detained would be tried according to the Geneva Convention, and called into question the nature of statehood as it was defined by the United States.

Within the western tradition of national sovereignty, the primary unit that determines the legal status of individuals is the national government to which an individual is or can be a citizen. This creates the possibility for the inclusion or exclusion of an individual from legal consideration. Within both Iraq and Afghanistan the state at the moment that the MCA had been passed and the executive order had been issued existed, but it was a state that had been created without the means of including the insurgent forces. As a result, for the bodies that were engaged in the insurgency, there was no possible allegiance which could be legitimately claimed. The state, in the context of the MCA and by extension executive order 13425, was an empty signifier. There was no state to speak of, and by extension, there were no lawful combatants.

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[235] Bush, George W. *Executive Order 13440-Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency*. 24 July, 2007. Federal Register 72 no. 141 (2007).

Notably, the MCA did not outline or describe the nature of these commissions, leaving that job to the Department of Defense. What the MCA did include was a specific provision that gave teeth to the finding in the executive order legislating that the persons tried under these commissions did not have rights under the Geneva Convention. Nor could the findings or evidence used at these commissions be used in a trial or court of law, functionally making it impossible for an appeal to be made within the U.S. courts. Although there is a sense in much writing in the War on Terror that the George W. Bush administration was alone in creating the conditions facing detained persons in this instance, Congress is guilty of complicity in the problem.

This is not to excuse the George W. Bush administration. As stated in executive order 13425, this legislation was intended to supersede and codify a military order issued on November 13, 2001. Although military orders, because they are not executive orders, constitute a different genre in title, their form remains the same. Although the military order of November 13, 2001, is itself worthy of criticism, what is more important for understanding executive orders is the difference in the formal relationship between this order and the executive order. To the extent that an executive order constitutes a change in the public law, its reach is much more extensive than a specifically military order which deals only with a question of military policy. The executive order, in this case, links the military order to the public law created by Congress.

The military order itself provides the framework for a military commission, which is absent from the congressional legislation. The congressional legislation then served the function of making public law the previously military law defined by the military

order. To complete this marriage, executive order 13425 designated the parts of the military order which would be superseded. In practical terms, all that was substantively changed was the definitions described above in the discussion of the MCA. The executive order through the practice of citationality was able to unite these disparate documents and laws under the purview of the executive branch. From a symbolic perspective, the assertion of the primacy of the role for the executive branch is impossible to ignore, but also unsurprising given the early actions taken by the George W. Bush administration.

From a standpoint more concerned with understanding the function of executive orders as a genre, this is an important particular case. The rhetoric of this executive order, by choosing not to reiterate or provide an entirely new text for the military order demonstrates the citation form rather than the iteration form. Executive order 13425 does not work through iterability, but rather through citationality, in that it becomes a site where the public law is transformed by the inclusion of the military law. Because this executive order brings together disparate pieces of existing legal code, it is not an order in the sense that it prompts new action. Indeed, it functions more as a confirmation of an existing status quo. Yet by uniting these two disparate pieces it makes formally public what had previously been not secret, but internal to the executive branch and the Department of Defense. In so doing, the executive order functions as a means not just to enact the legislation passed by Congress, but to make common to the country the code that previously belonged to the military.

As noted, neither the Military Commission Act, nor the military order or executive order had alleviated the most pressing question regarding the detention of "unlawful enemy combatants." Namely, that the treatment of detainees was not satisfactory either for the purposes of international law or the ethical sensibilities of Congress and the U.S. public. Thus, a peculiar but important executive order was issued on July 20, 2007, that was intended to address both concerns, albeit in very different ways.

A general trend that has delineated executive orders from signing statements and PPDs in the examples provided to this point is that executive orders, outside of the finding section, have not tended to provide a rhetorically rich text. They tend to rely on citations and lack ideological descriptions of both problems and their solutions. Executive order 13440 is a remarkable departure from this norm. This executive order, titled "Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency," demonstrates how an executive order can be used not only to modify policy, but also to define ideological commitments.

This executive order is somewhat different than the norm in that rather than a section titled "findings" this one has two separate "general determinations." The first of these holds that:

> The United States is engaged in an armed conflict with al Qaeda, the Taliban, and associated forces. Members of al Qaeda were responsible for the attacks on the United States of September 11, 2001, and for many other terrorist attacks, including against the United States, its personnel, and its allies throughout the world. These forces continue to fight the United States and its allies in Afghanistan, Iraq, and elsewhere, and they

> continue to plan additional acts of terror throughout the world. On February 7, 2002, I determined for the United States that members of al Qaeda, the Taliban, and associated forces are unlawful enemy combatants who are not entitled to the protections that the Third Geneva Convention provides to prisoners of war. I hereby reaffirm that determination.[236]

This determination references an unclassified memo issued in 2002. In that memo Bush had held that because al Qaeda did not constitute a state that could be a contracting party to the Geneva Convention, and did not qualify as a regular military force fighting on behalf of a state, their members were not entitled to protections under the Geneva Convention. Moreover, the problems posed by terrorism demanded a new paradigm that required new thinking over questions regarding the law of war.[237]

In reaffirming this determination, the George W. Bush administration simultaneously accomplished two goals. First, the determination affirmed that there was no legal problem created by the Geneva Convention as the combatants were not subject to the language in that convention. Second, it harkened back to the language in that memo that refered specifically to the treatment of detainees. This language is important in that although it held that the values of the United States and other countries mandated that detained persons receive humane treatment, that treatment would be subject "to the extent appropriate and consistent with military necessity."[238] The subsequent evidence of

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[236] Bush, George W. *Executive Order 13440-Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency*. 24 July, 2007. Federal Register 72 no. 141, (2007).

[237] Bush, George W. *Humane Treatment of al Qaeda and Taliban Detainees*. 17 June, 2004. NSA Archive at George Washington University. Accessed 6 May, 2017. http://nsarchive.gwu.edu/NSAEBB/NSAEBB127/02.02.07.pdf

[238] Bush, George W. *Humane Treatment of al Qaeda and Taliban Detainees*. 17 June, 2004. NSA Archive at George Washington University. Accessed 6 May, 2017. http://nsarchive.gwu.edu/NSAEBB/NSAEBB127/02.02.07.pdf

enhanced interrogation demonstrates beyond reasonable doubt that military necessity was a higher consideration than the values of the United States and other countries.

What is also prominent in this determination is the emphasis on the attacks of September 11, at this point more than five years earlier, alongside ongoing conflicts. Echoing the determination in the unclassified memo, the argument here is rooted in the nature of terror as a distinct and ongoing threat that merits distinctive treatment. The consistent finding beginning in November 2001, tacitly supported in the Military Commission Act of 2006 and executive order 13425, and reaffirmed in executive order 13440 deals with the threat posed by terrorism as an exceptional threat that cannot be addressed using existing legal and governmental frameworks. This exceptional status, as described in the original military order, required a rethinking of military and legal practices of persons detained in the course of military operations. What is telling, is that between the original determination in 2001 and executive order 13440 over five years later, there was no "rethinking" but rather a persistent affirmation of the original mechanism developed in 2001.

A cursory understanding of history is sufficient to demonstrate why no rethinking was required. The September 11 attacks were not the first time that the United States had dealt with a threat of this nature. Indeed, al Qaeda had attacked the United States before, suspected and real terrorists had been detained by both the United States and other countries before. It is not that circumstances such as those faced by the United States were altogether unthinkable or unrecognizable. What was distinctive, and under consideration both within the United States and abroad was the military strategic and

legal implications of developing a new national security strategy that relied on the use of coercive and torturous treatment of detained persons to increase the effectiveness of military action.

With this in mind, the reaffirmation of the original determination functions not as part of a process of rethinking, but rather as a retrenchment of previously held ideological commitments. Foremost among these commitments is the notion that the United States would not be bound by the Geneva Convention in pursuing the War on Terror. In foregrounding the threat of terrorism as a paradigm shift, the departure from existing international norms is externally justified even as the genuine cause is for the shift is an internal ideological commitment. The second determination in executive order 13440 drives home the legal implication of this form of commitment, "The Military Commissions Act defines certain prohibitions of Common Article 3 for United States law, and it reaffirms and reinforces the authority of the President to interpret the meaning and application of the Geneva Conventions."[239] With the commission of Congress, this executive order enacts the withholding of the United States from the Geneva Convention in pursuing the War on Terror.

The executive order's fundamental function was to address the detention program organized under the Central Intelligence Agency. This program had existed and operated semi-independently of the military for the duration of the George W. Bush administration. The benefit of this approach is that although the military would be subject to certain norms, practices, and levels of oversight including increased scrutiny

[239] Bush, George W. *Executive Order 13440-Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency*. 24 July, 2007. Federal Register 72 no. 141, (2007).

stemming from the Geneva Convention, the Central Intelligence Agency was more readily controlled under the executive branch because it was carried out under Title 50 of the United States Code which allowed for the practice of detention outside of combat.[240] Toward that end, to the extent that the United States was able to capture and detain persons outside of combat during wartime conditions declared by the President, those persons were considered "enemy aliens" that could be handled outside of the military commission process. Indeed, the code specifically empowered the President, "to direct the conduct to be observed on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety."[241]

Prior to the public consciousness of the CIA program, the George W. Bush administration was able to carry out and perform this practice of extraordinary rendition, detention, and interrogation without any substantial oversight because it was operating outside of the normal practices for military detention. This executive order, passed after the public awareness of the CIA program, was intended to formalize the process in keeping with the Military Commissions Act of 2006. What executive order 13440 ultimately does is provide a carefully worded ascension to the standards set by the

[240] US Code 2006, Title 50, Chapter 3, Section 21, Para 1.
[241] US Code 2006, Title 50, Chapter 3, Section 21, Para 1.

Geneva Convention by interpreting the convention in a manner congruent with United States code that is more permissive than is the intent in the Geneva Convention.

To do this, the third section of the order renders a determination that, "Common Article 3 shall apply to a program of detention and interrogation operated by the Central Intelligence Agency as set forth in this section." This determination is worded in the future tense, that Common Article 3 "shall" apply rather than in the past tense as a retroactive determination. This is indicative both that the standards set by the George W. Bush administration are a departure from the status quo, hence the need for an order that does more than simply render a determination that the program is in compliance, and more importantly, that the President is doing the work of interpreting the Geneva Convention. In so doing, the executive order is creating a critical difference between the meaning of the Geneva Convention as a text, and the meaning created through the interpretive work of the President. This gap creates the conditions of possibility for action by the CIA which is not in keeping with the understanding of the Geneva Convention shared by the international community, but which the President deems to be in keeping with these conventions in the name of military necessity.

The operative language which follows provides the text that would be applied to bring the CIA program into compliance. The section begins, "I hereby determine that a program of detention and interrogation approved by the Director of the Central Intelligence Agency fully complies with the obligations of the United States under Common Article 3, provided that:" Again, positing the determination in the future tense, the section posits that the President will render a favorable determination on the program

"provided that" indicating that certain conditions are modified to meet a set of standards which will be outlined following the colon. This list of standards helps make clear the critical gap between how the George W. Bush administration perceived an appropriate detention program and the international standards at the time.

The first standard listed in executive order 13440 is that certain practices are not included as a part of the detention program. The first of these practices is torture as defined by U.S. Code Title 18, Section 2430. The standard set in the code here is actually quite expansive, and would render essentially impossible the practice of enhanced interrogation by the United States. The second and third of these practices are defined under Section 2441 of Title 18 which pertains to the commission of war crimes and specifically binds the United States to the Geneva Convention. The fourth practice is the use of inhumane treatment defined under the Military Commissions Act of 2006 and the Detainee Treatment Act of 2005. The fifth practice appears to reference very specifically the descriptions of events taking place in Guantanamo Bay that had also been present in the infamous Abu Ghraib prison:

> Willful and outrageous acts of personal abuse done for the purpose of humiliating or degrading the individual in a manner so serious that any reasonable person, considering the circumstances, would deem the acts to be beyond the bounds of human decency, such as sexual or sexually indecent acts undertaken for the purpose of humiliation, forcing the individual to perform sexual acts or to pose sexually, threatening the individual with sexual mutilation, or using the individual as a human shield.[242]

[242] Bush, George W. *Executive Order 13440-Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency*. 24 July, 2007. Federal Register 72, no. 141, (2007).

Finally, the last standard was acts intended to denigrate the religious practices or beliefs of a detained individual.

Taken as a whole, this list of practices carries out three important tasks. First, it creates a tie to the Geneva Convention that flows through the United States code. Second, it ties the detention program to actions taken by Congress to curb abuses. Third, without specifically rendering a condemnation of practices that had been endemic to both the CIA and military detention programs, it prohibits the continuation of those practices. Yet these tasks are couched in a negative, practices which do not violate these standards are permissible.

Couching the restrictions in a negative manner is problematic because it does not create an affirmative relationship to the restrictions. In the absence of such an affirmative relationship there are two undesirable outcomes. First, the possibility of circumvention is created. Agents of the government are enabled to find means of interrogation which may satisfy the letter of the law in the order without satisfying the spirit of the law, allowing torture to continue. Second, by couching these practices in the negative while failing to repudiate past conduct, the executive order operates without historical context or political context. As a result, there is a lack of clarity about what in the program specifically must change. The institutional norms and sensibilities critical to reforming or changing such a program remain absent.

This is not to say that the creation of such standards is wrong. The standards themselves in a vacuum are at least a move in the right direction. Yet by couching them in this particularly weak manner, the George W. Bush administration missed an

opportunity to create not just a legalistic, but an institutional and ethical norm against the use of torture. This failure both left the administration open to substantial criticism and permitted the conditions that permitted torture to continue. It is worth noting that in particular the practice of indefinite detention at Guantanamo Bay would continue for the duration of the George W. Bush administration, belying the notion that this executive order was a disavowal of existing policies.

The second set of conditions define who may be detained in the CIA program based on a decision by the director of the CIA using a set of criteria determined by the President. The first of these criteria is simple enough. To be included a person must be believed to be a member of al Qaeda, the Taliban, or associated forces. The second criterion is more disconcerting, holding that a person could be detained if they possessed information that:

> (1) could assist in detecting, mitigating, or preventing terrorist attacks, such as attacks within the United States or against its Armed Forces or other personnel, citizens, or facilities, or against allies or other countries cooperating in the war on terror with the United States, or their armed forces or other personnel, citizens, or facilities; or
> (2) could assist in locating the senior leadership of al Qaeda, the Taliban or associated forces.[243]

What is important in this description is that the definition of persons who may be detained shifts from actions and associations toward the knowledge possessed by a particular person. This shift is important, in that it makes possible the decision to detain persons who have not in fact engaged in substantial wrongdoing. The possession of

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[243] Bush, George W. *Executive Order 13440-Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency*. 24 July, 2007. Federal Register 72, no. 141, (2007).

information is not itself an act of terrorism, and is certainly not criminal or threatening in a manner analogous to membership in a terrorist organization.

The description of persons who may be detained here is significant in that it explicitly subordinates the human and civil rights of a person potentially subject to detention to the use value of the information they hold. For the Central Intelligence Agency, there is little institutional motivation to consider the inherent human quality of a person who may possess valuable information. In such a circumstance any possibility that potentially valuable information held by a potential detainee would assuredly be sufficient to justify detention. In short, what this standard affirms is the authority of the CIA to detain any person who could conceivably be of use in the terror wars.

So although the executive order is posited as a restriction on the detention program, it is limited to a restriction on the practices within the program rather than the practice of the program. This shift is of course important when the particular ethical consequences of torture are considered, but overshadows the problems created by a widespread detention and interrogation program. By retaining the authority to detain persons in an extrajudicial manner based on internal criteria defined only by self-interest, the CIA detention program is still capable of massively disrupting not only the lives of detained persons, but entire communities with serious risk of creating or magnifying blowback.

The next standard gives the director of the CIA the ability to make decisions regarding the treatment of detainees. Specifically the wording is, “the interrogation practices are determined by the Director of the Central Intelligence Agency, based upon

professional advice, to be safe for use with each detainee with whom they are used." This wording gives control to the agency responsible for gathering information to determine what constitutes safety. Notably, professional advice is inferred. This notion of professional advice could of course mean many things, including advice from within the Central Intelligence Agency, but is most likely a reference to the use of outside professional advice to guide the program.

The inference from the preceding analysis is that outside guidance or control would be more desirable than the practice of letting the fox guard the henhouse approach of giving the director of the CIA total control over the program. Unfortunately, recent reporting has proven this is not the case. As Risen reported in the New York Times, outside psychologists consulted about the CIA's interrogation program shouted down concerns about maltreatment voiced by health professionals inside the CIA.[244] The report referenced in Risen's reporting, known as the Hoffman Report, emphasized in its finding that American Psychology Association (APA) professionals consulted on the interrogation practice were motivated to curry favor with the Department of Defense for the substantial benefits such a relationship could provide. As a result, their findings tended to authorize worse treatment than even health professionals working directly for the DOD and CIA. At the very least, ongoing abuses were ignored, as APA professionals preferred to take a "head in the sand" approach (11).[245] As noted in the report, this

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[244] Risen, James. "Outside Psychologists Shielded U.S. Torture Program, Report Finds" *New York Times*, July 10, 2015. Accessed 5/5/15. https://www.nytimes.com/2015/07/11/us/psychologists-shielded-us-torture-program-report-finds.html

[245] Hoffman, David et. al, "REPORT TO THE SPECIAL COMMITTEE OF THE BOARD OF DIRECTORS OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION" *Independent Review Relating to APA Ethics Guidelines,*

process of outside consultation began in 2005 and continued through 2009, with the executive order occurring in the midst of this process. Without explicitly referencing the ongoing consultation, the executive order is an oblique citation that affirms the ongoing process. While it could be debated whether or not the Bush administration was aware of the nature of the relationship between the DOD, CIA, and APA professionals, the executive order tacitly affirmed the consequences of the ongoing process.

The last standard set in the executive order sets a floor for the treatment of detainees, holding that, "detainees in the program receive the basic necessities of life, including adequate food and water, shelter from the elements, necessary clothing, protection from extremes of heat and cold, and essential medical care." The problem inherent in setting such a floor is that it does not create a limitation on the treatment to which detainees are exposed. Indeed, it leans toward permissiveness in determining what is appropriate by couching the responsibilities toward detainees in terms of providing "basic necessities of life." Not only does this frame permit the suspension of other rights, especially legal ones, but it orients the standards for the program around a minimal level of care for detained persons. This minimalist framing is ultimately permissive of other abuses of detained persons so long as specifically enumerated necessities are simultaneously present. This focus on textually demanding that the merest conditions for detention be satisfied, rather than at a minimum focusing on the wellness of the detained person, provides the conditions of possibility within the executive order for the abuse and torture of detained persons.

National Security Interrogations, and Torture. July 2, 2015. Accessed 5/5/15, https://www.apa.org/independent-review/APA-FINAL-Report-7.2.15.pdf

A charitable reading of this executive order would conclude that despite some inherent problems in a reading of the executive order, it does provide meaningful protections for detained persons. This reading is accurate insofar as adherence to the absolute letter of the law would constitute a significant improvement over the conditions for detained persons early in the terror wars. Yet the Hoffman Report clearly demonstrates that abuses occurred (with assistance from APA professionals) even after this executive order. The problem with a textual reading that emphasizes a hermeneutics of charitability is that it fails to explain why abuses continued. This begs the question of what the implicit function of an executive order is.

Although executive orders are legal documents that impart responsibility to act on various parts of the government, they do so primarily through the citation of other parts of law in conjunction with presidential determinations. When executive orders like 13440 lack a substantial finding, determination, or other statement altering the institutional orientation of the departments and agencies housed under the executive branch, the institutional momentum will tend to sustain abuses. When an institution has strongly entrenched politics and interests, like the Department of Defense and CIA, the risk of such an outcome is significant.

Although the notion that a differently worded executive order would necessarily produce a distinct outcome is problematic, an executive order which included a rigorous finding and repudiated the status quo practices would tend toward an institutional reorientation, rather than being perceived as setting a legal minimum standard for conduct while sustaining the status quo. Problematically, under the George W. Bush

administration, other executive orders that specifically sought to address military or national security tactics tended to lack such a finding.

At play in the issuance of executive orders is the attempt to navigate the legal and constitutional framework of the United States. To do this, the George W. Bush administration sought to avoid the legal system at all costs, preferring to treat detainees in a manner that limited at all costs the possibilities for legal recourse. This particular set of executive orders operates simultaneously to limit the efforts of Congress, situate the legal system in a manner that raises legitimate questions about the universality of that system, and outline a bureaucratic norm for the treatment of detainees. In so doing, the executive orders pertaining to the treatment of detainees function as a far reaching attempt to solidify the power of the executive branch not just over detainees, but the determination of national policy.

The George W. Bush administration, in issuing executive orders designed to inaugurate specific changes in policy, dealt most directly with the problems stemming directly from the terror wars. For the Obama administration these executive orders took two different approaches. The first were those intended to repair the damage done by Bush administration policies in the terror wars. Examples can be found in executive order 13942 and 13493, which dealt directly with the problems stemming from executive order 13440.

Executive order 13492 was one of the more important and controversial executive orders of the Obama administration. In this executive order Obama stated explicitly the goal of closing the Guantanamo Bay detention facility and ending the George W. Bush

administration practices regarding indefinite detention and enhanced interrogation. That Obama had campaigned in part on ending these practices, and because the actions in question had been established as largely the purview of the executive branch under the Bush administration, the executive order provided a timely means to pursue a hotly contested and publicly perceived political question.

To address this problem Obama relied on a more extensive use of citationality than would prove to be typical of later executive orders, but characteristically preferred to tie the citations to more specific dictates within the orders than were present under the Bush administration. The first paragraph of Executive order 13492 demonstrates the departure from the standard practice of the Bush administration of referencing specific grants of authority:

> By the authority vested in me as the President by the Constitution and the laws of the United States of America, in order to effect the appropriate disposition of individuals currently detained by the Department of Defense at the Guantanamo Bay Naval Base (Guantanamo) and promptly to close detention facilities at Guantanamo, consistent with the national security and foreign policy interests of the United States and the interests of justice, I hereby order as follows:[246]

In this introductory paragraph rather than relying on specific grants of authority, the Obama administration relies on a more general grant of authority tied to the Constitution. This general reference, which would require greater explanatory work to make clear the textual support for constitutional authority is intentionally kept vague. To the extent that more specific articulation is provided, it is in the last clause, emphasizing the national security and foreign policy interests of the United States. This vague reference draws on

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[246] Obama, Barack. *Executive Order 13492-Review and Disposition of Individuals Detained At the Guantanamo Bay Naval Base and Closure of Detention Facilities*. 27 January, 2009. Federal Register 74, no. 16, (2009).

the already established norm for presidential authority established under the George W. Bush administration. Despite this general authority, the intention of this document is significantly narrowed in scope, with the goal articulated as the closure of Guantanamo rather than a fundamental change in the detention or interrogation practices of the United States.

What is distinctive about this particular executive order is that in its findings it directly references and criticizes the detention program. After the first finding outlines the number of persons detained in the terror wars at Guantanamo (800) and the number still detained that must be addressed (300), the executive order provides the type of finding absent in the Bush era executive orders:

> Some individuals currently detained at Guantanamo have been there for more than 6 years, and most have been detained for at least 4 years. In view of the significant concerns raised by these detentions, both within the United States and internationally, prompt and appropriate disposition of the individuals currently detained at Guantanamo and closure of the facilities in which they are detained would further the national security and foreign policy interests of the United States and the interests of justice. Merely closing the facilities without promptly determining the appropriate disposition of the individuals detained would not adequately serve those interests. To the extent practicable, the prompt and appropriate disposition of the individuals detained at Guantanamo should precede the closure of the detention facilities at Guantanamo.[247]

This finding makes two important judgments. The first is an ethical one. It acknowledges that the detention practice does not serve the interest of "justice." While that term is fraught in philosophical debates, for our purposes here it is sufficient to acknowledge that there is a degree of treatment and care that is due to detainees. The

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[247] Obama, Barack. *Executive Order 13492-Review and Disposition of Individuals Detained At the Guantanamo Bay Naval Base and Closure of Detention Facilities*. 27 January, 2009. Federal Register 74, no. 16, (2009).

sensibility behind this judgment is expressed in the unnecessary inclusion of the information about the length of the detention. Including this information makes an enthymematic claim that persons have been detained for an extended period that is inappropriate. This is reinforced by the reference to the concerns raised by those detentions. This vague reference calls into mind the widespread criticism of the program, framing the executive order as a repudiation of the program.

The second judgment is that the practice of detention is counterproductive for the security interests of the United States. This judgment is significant in that it places the purview of the detention program within the general field of presidential responsibility. While the question of justice, with its tie to legal questions may be situated as a concern for the court, couching the concern in terms of national security gives the Obama administration a claim to authority. The nature of the concern for national security is left vague, but the reference to concerns raised domestically and abroad points towards the likely consequences stemming from other nations disapproval of the program.

This finding then, functions as a repudiation of the detention program. In a departure from the Bush administration, this finding references explicitly the problems created by the program, and even acknowledges the injustices facing detained persons. This shift is important, because it works to delegitimize the existing institutional norms supporting the practice, and grounds the need for change described by the Obama administration. This is reinforced by two lines from separate later paragraphs in the finding. The first provides the first presidential acknowledgement that detained persons possess habeas corpus rights. The second concludes, “The unusual circumstances

associated with detentions at Guantanamo require a comprehensive interagency review." The inference in both lines is that the program itself functions outside of the acceptable legal norms for detention practices.

The last finding asserts presidential authority for the review specifically under the Military Commissions Act of 2006, providing the citation for action alongside a specific finding that the executive branch has the authority to carry out commissions. Citing this authority performs the reversal of the institutional norms of the Bush administration. While the authority to act remains the same, the Obama administration is using this executive order to reverse course by using the act to eliminate the detention program by processing all of the detainees.

This reversal is most plainly stated in section six of the executive order, which outlines the standards for humane treatment. In this section the order is given that:

> No individual currently detained at Guantanamo shall be held in the custody or under the effective control of any officer, employee, or other agent of the United States Government, or at a facility owned, operated, or controlled by a department or agency of the United States, except in conformity with all applicable laws governing the conditions of such confinement, including article 3 of the Geneva Conventions.[248]

This sentence, in a dramatic shift from the Bush era practices of outlining terms of treatment that attempt to skirt or provide partial compliance with the Geneva Convention by articulating specific minimum standard of care while retaining a distinct status for detained persons, orders that detained persons be treated in compliance with all applicable laws. This reversal provides an institutional norm against enhanced

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[248] Obama, Barack. *Executive Order 13492-Review and Disposition of Individuals Detained At the Guantanamo Bay Naval Base and Closure of Detention Facilities*. 27 January, 2009. Federal Register 74, no. 16, (2009).

interrogation that responds to the tendency of non-compliance by placing the persons detained at Guantanamo as analogous to the standard treatment of prisoners of war. This move fundamentally repudiates and reverses the norms established under the Bush presidency.

At the end of the Obama administration, 41 persons were still detained at Guantanamo Bay. With the reversal described above it is plausible to ask why the practice of indefinite detention had not altogether ceased. It is also plausible to ask why the mandate within the order that Guantanamo be closed in one year was not followed. The short answer is that Congress interceded. Despite passing the Military Commissions Act of 2009, which gave the President the ongoing authority to pursue trials of detained persons, the act also blocked appropriations to fund Guantanamo Bay. Addressed in the earlier chapter dealing with signing statements, even though the President took action to limit the negative effects of this law, it provided a substantial stumbling block.

Another part of the problem can be found in the executive order issued on the same date as executive order 13492. One of the inherent problems with detaining persons is that there is a risk of recidivism, either because of pre-existing beliefs or beliefs formed in captivity. The specific framing found in executive order 13493, which notably lacked the more powerful repudiation of the detention program found in executive order 13492, clarifies the root of the problem.

Executive order 13492 relied less on the practice of citationality through direct references as a means to authorize and justify ongoing action than did executive order 13492 or the George W. Bush administration executive orders. Notably, the opening

statement in executive order 13493 does not directly reference any of the acts present in the Bush administration executive orders. Instead a more general approach is taken stating:

> By the authority vested in me as President by the Constitution and the laws of the United States of America, in order to develop policies for the detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations that are consistent with the national security and foreign policy interests of the United States and the interests of justice, I hereby order as follows:[249]

This approach does contain references, in this case to the Constitution and the laws of the United States of America. Yet, again in a departure from George W. Bush, there is no reference to specific laws or codes. Instead, a general reference is used. This practice of a more general reference relies on the already established norm for Presidents to render the decision over the treatment of detainees, specifically established under the Bush administration. With this power established, the document goes on to establish an "Interagency Task Force" to determine the disposition and means for processing and trying or releasing detained persons. These more general references are significant in that they rely on a norm rather than specific statutory authority. Even the most specific reference to the Constitution is only tenable with significant interpretive effort.

The reliance on this norm demonstrates both the work done by the Bush administration and Congress to establish the role of the executive branch in this particular area. Obama, in a move characteristic of his presidency did not renounce this role, but rather sought to use it to a distinct political end. In this instance, to establish a task force

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[249] Obama, Barack. *Executive Order 13493-Review of Detention Policy Options*. 27 January, 2009. Federal Register 74, no. 16, (2009).

designed to end the practice of indefinite detention and by extension the norms for interrogation within the CIA and DOD detention programs. What remains problematic with regard to the nature of the detention and interrogation program is that although Obama attempted to end the program using this executive order, in this order he failed to repudiate the history of detention and interrogation in the terror wars.

The failure to do so left this order as an exercise in presidential authority to render decisions about detained persons, demonstrating the problem innate to the problem of presidential power. Presidential authority over the treatment of detainees exists independent of the political and ethical decision to end the practice of indefinite detention. Though the intention of this document is to end the practice, that the authority to determine treatment exists paradoxically supports the ongoing detention program. The result is twofold, first Obama had to sustain this authority as a means to end the practice of detention rather than turning the question over to the court. Second, Obama lacked the means to deal with detainees who were perceived to carry a high risk of recidivism.

In 2011 the Obama administration would issue another executive order that attempted to put to work the efforts of the interagency task force to develop a policy to deal with the detention problem. Executive order 13567 laid out the process for an ongoing review of the status of persons detained in relation to the terror wars. The persons that this act pertained to, but were not named as such, were persons who could not be tried, but would pose a genuine security risk if released.

The order itself does not constitute a radical change in policy. It simply creates a yearly review process for persons still detained under the auspices of executive orders

13492 and 13493. What is interesting is the citation practice for this executive order shifts. Altogether abandoning the Military Commission Act used in previous executive orders by both Bush and Obama, executive order 13567 relied instead on the Authorization for the Use of Military Force Against the Terrorists. This citation is remarkable, in that it centers the detention question squarely within the coordinates of the terror wars. This move is in substantial ways a reversal of the move made in executive order 13492 to repudiate the practices of the terror wars. Rather than rejecting the overarching power of the presidency, in the same way that executive order 13493 worked as an assertion of presidential prerogative rather than a means to change institutional norms against the practice of indefinite detention, executive order 13567 is an affirmation of presidential power.

This use of language in the executive order is not sufficient to justify the conclusion that it was a failing of the Obama administration to take a stronger stance in the use of executive orders permitting the ongoing practice of indefinite detention. The contingent conditions, including the nature of the persons detained, particular decisions rendered in the review process, and legal obstacles alongside political pressure contributed to the failure to close Guantanamo. Nonetheless, a significant consequence of the executive orders issued under the Obama administration was that even as the tools were used to reduce the scale of the practice, the authority to continue the practice remained unquestioned because the executive order as a genre relied on the practice of citing authority that in general privileged the status quo.

At play in Obama's approach to executive orders is an emphasis on the use of presidential power to ameliorate the policy problem by transforming it. Rather than treating detainees as an enduring threat to national security, they are treated as criminal bodies that must be addressed through a legal system, even if that system operates outside the norms of law. To perform this movement the Obama administration relies on the development of discourses that selectively engage with the actions taken by Congress while retaining the assertion of presidential prerogative. This move is a redeployment of the sub-genre of executive orders that relies less on the nature of the emergency which animated the executive orders issued by the Bush administration than on trying to put to work elements of constitutional thought familiar to UET but more reliant on congressional action.

The consequence of this problem inherent in executive orders is significant. The norms supporting such a practice and the presidential prerogative that supports it remained valid to both conservative elements of the U.S. public and more importantly within the constitutional legal thought of what the executive branch could authorize and defend. For this reason the possibility remained for future presidents to restart the practices of the Bush administration or even expand them. To the extent that executive orders have the force of law, without the inclusion of explanatory wording that provide institutional norms they are only able to call on the power of the office rather than make determinations about the power inherent in the office.

To operationalize executive orders that deal with the tactical decisions made by Presidents in pursuing the terror wars the practice of citationality became a feature of this

particular genre. To make the executive orders used to direct military policy function there was an inherent demand and need for calling on the legacies of action to lend legitimacy and understanding to the content of the order. This element of the genre is not politically neutral, it privileges the pre-existing assertions of what is appropriate for presidents to act on in a manner that tends to reinforce existing policy norms. It is possible, as Obama demonstrated, to break this trend by repudiating the norms surrounding particular practices. Yet repudiating those norms does nothing to reconfigure the authority given to the presidency which makes such practices possible. The genre itself relies on a conservative (in the sense that it is resistant to change) understanding of presidential power that limits the possibility of presidents to take action to limit the power of the executive branch.

Building Institutions

The particular decisions and policies used by the George W. Bush administration to pursue the terror wars depended on the power to create institutions. Presidents have long used the executive order as a means to create the institutions needed to administer specific areas of foreign policy. This power is particularly important for a president who perceives new threats and attempts to create new solutions. In the case of the terror wars this meant a blurring between the domestic and international realms of policy formation through the use of executive orders to create agencies inside and outside the United States government, such as the Department of Homeland Security and the provisional government of Iraq.

Executive orders that seek to develop new institutions have an immanent relationship to the production of a broader and more powerful executive branch. The aim of these executive orders is to enable the executive branch to address new policy problems by creating a dedicated office, agency, or department to focus resources and efforts to ameliorating the problem. In so doing, the executive branch is adding to the already substantial list of capabilities and responsibilities that flow from the office of the President. The ability to expand the power of the office of the president in response to problems defined by the president makes executive orders a remarkably potent policy making and changing tool.

Although the George W. Bush administration issued a large number of executive orders that either created or modified existing institutions, to understand how these executive orders function as a part of the genre, my analysis will focus on two particular uses. The first of these uses stems from the creation of the domestic infrastructure needed to pursue the terror wars. The second stems from the use of executive orders to create institutions overseas to manage the terror wars. Although these documents are written in a similar manner, the differing justifications and ends to which they are put require different treatments.

The domestic infrastructure to pursue the terror wars was created essentially from scratch by the George W. Bush administration. This process formally began on October 8, 2001, with the creation of the Office of Homeland Security in executive order 13228. Issued within a month of the attacks of September 11, this executive order demonstrated important commitments by the Bush administration in the initiation of the terror wars.

The first of these commitments was the notion that the terror wars provides a demonstrative change from the past experiences in U.S. national security. It is worth noting that past terrorist attacks, even those that were comparable in terms of what they hoped to achieve, were never configured as an existential national security threat. Indeed, until September 11, the most significant attack in the United States was not from a foreign organization, but was a domestic threat. Despite the domestic nature of this threat, the response was not a concern over "homeland" security.

Domestic security was a concern, but the articulation and understanding of the problem as a threat to the "homeland" was not well understood. Even the attacks on September 11 were not conceived of as a "homeland" threat. That term itself did not appear in the speeches given by Bush administration officials, and it was not a feature in the dominant media reporting on the attacks. It was not until the Bush administration made clear that it was creating a new office to deal with threats of this nature that the term entered the public lexicon in relation to the threat of terrorism.

In the order creating the Office of Homeland Security (OHS) the perogative of the office was described as: "The mission of the Office shall be to develop and coordinate the implementation of a comprehensive national strategy to secure the United States from terrorist threats or attacks. The office shall perform the functions necessary to carry out this mission, including the functions specified in section 3 of this order."[250] In this description the office does not appear to be large. Its primary mission appears to be the development of a strategy and coordinating with other larger departments in

[250] Bush, George W. *Executive Order 13228-Establishing the Office of Homeland Security and the Homeland Security Council*. 10 October, 2001. Federal Register 66, no. 196, (2001).

implementing the strategy. The decision to explain the function of this office as a mission also implies that there is a particular task that might indeed be temporary. Under this interpretation, the decision to create an office rather than a department makes a great deal of sense. Where the executive branch lacks the ability to create an entire department because of the size and scale of appropriations that such a decision would infer, an office can be created unilaterally.

The Office of Homeland Security was then created to serve twelve different functions. Although each of these is significant, two examples are selected here to demonstrate the way in which different framings of the function of the OHS provide different senses of authority. The first of which is:

> (a) *National Strategy.* The Office shall work with executive departments and agencies, State and local governments, and private entities to ensure the adequacy of the national strategy for detecting, preparing for, preventing, protecting against, responding to, and recovering from terrorist threats or attacks within the United States and shall periodically review and coordinate revisions to that strategy as necessary.[251]

This task gives the office a position alongside departments, agencies, and other governmental bodies to develop a strategy and retain a certain degree of oversight capacity. This approach to the office limits its individual authority. The OHS can direct other agencies, it can develop strategies, and it can produce information, but it is not independently empowered to take action.

This function paints a relatively limited role for the OHS. It does not have enforcement power, it cannot compel action, and it ultimately relies on the force of the

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[251] Bush, George W. *Executive Order 13228-Establishing the Office of Homeland Security and the Homeland Security Council*. 10 October, 2001. Federal Register 66, no. 196, (2001).

executive branch to compel compliance. With such limited authority this new office seems to lack the ability to take significant action. In short, the office functions as a clearinghouse for information that does not have investigatory or implementation power. It essentially exists to respond to apparent problems in communication that exist within different executive branch agencies. Yet this would not prove to be the limit figure of the office of homeland security, and its subsequent function would create the potential for a broader role for this office.

The second function outlined for this office is:

> (b) *Detection*. The Office shall identify priorities and coordinate efforts for collection and analysis of information within the United States regarding threats of terrorism against the United States and activities of terrorists or terrorist groups within the United States. The Office also shall identify, in coordination with the Assistant to the President for National Security Affairs, priorities for collection of intelligence outside the United States regarding threats of terrorism within the United States.[252]

In giving this office the function of detecting potential threats the authority becomes much broader. This function all but mandates that OHS must be responsible not just for coordinating information, but directing the investigative efforts of other executive branch agencies. Indeed, it functionally posits the OHS as a meta-agency that directs other agencies within the field of homeland security. The operative phrase here is "identify priorities" which places responsibility on OHS to make determinations about which information must be pursued and under which conditions it ought to be pursued.

What these two examples demonstrate is the problem that arises when the notion of a coordinating office is used to resolve problems of communication. Because the

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[252] Bush, George W. *Executive Order 13228-Establishing the Office of Homeland Security and the Homeland Security Council*. 10 October, 2001. Federal Register 66, no. 196, (2001).

executive order requires the creation of a new office for the articulation of specific functions, there is by necessity the articulation not only of an area of expertise, but a role in directing other agencies within that area of expertise. Thus, the ability either to act, or direct other agencies to act, becomes an integral part of the function of that office. The result of such an office is that despite the best attempts at a conservative wording that limits the scope of the office, there is an inherent trend towards a creeping responsibility so that the office may take action.

Notably, this office had remarkable access to the President. The office was placed under the direction of the newly created "Assistant to the President for Homeland Security" which created a direct conduit for the office to the presidency. With this direct conduit the OHS would have a privileged relationship to the office of the President and would have a remarkable effect on domestic affairs through the creation of the "Homeland Security Council," which would include as its members essentially all cabinet level officials within the executive branch. In including such a broad membership, President Bush was not only creating a new meta-agency, he was creating a new area of policy concern that required the concerted effort of the entire executive branch.

Although the tendency to creep towards a more expansive mission is an inherent risk in the executive order genre, it is not necessarily an inherent risk. As Dory notes, executive order 13284 which was intended to create a citizen preparedness task force for the War on Terror ultimately proved to have little effect. No actual report, as mandated by the executive order, was ever made public. The functions of that task force were

largely subsumed by the OHS under the leadership of Tom Ridge (40-41).[253] The short order issued to create the task force, and the limited function of that taskforce, along with the demand that after the creation of a report it would be disbanded, created a weak institutional foundation that allowed its role to be subsumed by OHS.

The different trajectories of these two bodies demonstrate the importance of the rhetoric used by presidents in determining the future of the offices which are created. In the case of the OHS the office was discussed as having an important enduring role in maintaining national security. In the case of the Presidential Task Force, this role was described in much more limited terms that were readily assumed by the existing OHS. There are other institutional reasons for why this happened, but none of those reasons would be feasible absent an element of permissiveness embedded within the language used in both of these executive orders.

By June 2002, the proposal had already been made to expand the Office of Homeland Security into a Department of Homeland Security. This transition into a Department would be completed with the passage of the Homeland Security Act in November 2002. With the passage of the new act and the conversion of the OHS into the Department of Homeland Security (DHS) the size of the DHS was dramatically expanded to include such disparate and far flung agencies as the Immigration and Naturalization Service (INS), Federal Emergency Management Association (FEMA), and the Plum Island Animal Disease Center.

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[253] Dory, Amanda J., *Civil Security: Americans and the Challenge of Homeland Security.* CSIS Report, 2003, 40-41.

Because the OHS was created using an executive order, there were substantial modifications to the organization of the office that needed to be done to account for OHS' reconstitution as the DHS. This was accomplished through a series of executive orders that modified both the original executive order that created and authorized the OHS, as well as other executive orders issued by President George W. Bush and previous Presidents to bring the other departments and agencies into concert with the DHS. This series of changes was performed in executive orders 13284 and 13286.

In contradiction to some of the executive orders analyzed to this point which emphasize the personal power of the presidency and the ability of the president to generate norms within enforcement through executive orders that are not entirely captured through a legalistic textual reading, these executive orders tend towards a more legislative language. In particular, because the language used in these orders not only issued direct commands that particular actions be taken, but also designated changes in previous texts and pieces of legislation. In this way, they are similar to the amendments to existing legislation common to laws passed by Congress. For example, in executive order 13284, the text of section 2 reads:

> Executive Order 13231 of October 16, 2001 ("Critical Infrastructure Protection in the Information Age"), is amended by:
> (a) inserting "(i) Secretary of Homeland Security;" after "or their designees:" in section 6(a); and
> (b) Renumbering the subsequent subsections in section 6(a) appropriately.[254]

Absent a specific context, the notion of an order implies that there is a push for new action that is either original or supplants entirely an existing action. The text here

[254] Bush, George W. *Executive Order 13284-Amendment of Executive Orders, and Other Actions, in Connection With the Establishment of the Department of Homeland Security*. 23 January, 2003. Federal Register 68, no. 18, (2003).

implies much more strongly a legislative process of revision that intuitively makes sense when developing institutions, but is not always necessary for taking an original direct action (such as seizing funds) or creating a new policy (such as changing the detention practices of the United States). It is not the case that there are no examples of such an approach in the other types of executive order analyzed here, but the examples are much less prominent and significant. By contrast, in creating, developing, and growing new institutions within the executive branch, the President is almost forced by circumstance to use an approach that is more inherent to legislative techniques.

Following the issuing of executive order 13286 on February 28, 2003, the DHS would remain unmodified until August 27, 2004. On that day the executive branch would issue four different executive orders designed to substantially modify the DHS. The first of these sequentially is executive order 133533, which created and established the President's Board on Safeguarding Americans' Civil Liberties. This board was responsible for creating a proposal to limit the infringement on civil liberties that was perceived to stem from the PATRIOT Act and the increased investigative power exercised by executive branch agencies. This board, institutionally housed in the DHS was conceived of as a response to concerns that the intelligence apparatus was overreaching.

At the same time the next executive order 13354 created the National Counterterrorism Center (NCTC). This body was created to resolve the inherent problem created by using a domestic agency, like the DHS, to integrate and disperse information regarding terrorism. The NCTC provided the government with a dedicated

body to analyze and disperse intelligence that was dedicated to terrorism without being constrained or distracted by more purely domestic concerns. As the order describes the purpose of the NCTC, "to protect the security of the United States through strengthened intelligence analysis and strategic planning and intelligence support to operations to counter transnational terrorist threats against the territory, people, and interests of the United States of America."[255] That the threat is described as transnational delineates the role for the NCTC from the DHS in that the NCTC is framed around the largely external source of threats provided by terrorism.

The thrust of this concern, to create dedicated and clear lines of communication to deal with terrorism is evident in two subsequent executive orders. Executive order 13355 is written to make the Director of Central Intelligence (DCI) the official of record responsible for informing the President on the intelligence gathered on terrorist activities. The DCI is also empowered to oversee and direct the counterterrorism efforts of the United States dealing with intelligence gathering. This broad writ of authority was reinforced by the ability provided in executive order 13354 to appoint the director of the NCTC. These two orders work symbiotically to tie the intelligence gathering functions of the different branches of government to an international focus directed by an agency that has its primary institutional ties to the CIA.

The last of the August 27 executive orders is 13356 issued to strengthen the sharing of information regarding terrorism between the agencies of the executive branch. This executive order was written to create an affirmative obligation between the various

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[255] Bush, George W. *Executive Order 13284-Amendment of Executive Orders, and Other Actions, in Connection With the Establishment of the Department of Homeland Security*. 23 January, 2003. Federal Register 68, no. 18, (2003).

executive branch agencies to share information pertaining to terrorism. This obligation extended to intelligence gathering within the United States, creating a meshed interface between the international and domestic anti-terror efforts. This order also created the Information Systems Council (ISC) which would be responsible for insuring the creation of "an interoperable terrorism information sharing environment to facilitate automated sharing of terrorism information among appropriate agencies."[256]

Taken as a collection these executive orders worked to create a framework for the gathering and disseminating of information pertaining to the threat posed by terrorism. This framework served four important functions. First, it created a streamlined flow of information to the President, with the Director of Central Intelligence as a primary conduit. Second, it created dedicated agencies for addressing terrorism that were intended to work in concert. Third, it expanded the authority of the government to perform domestic intelligence gathering. Fourth, it created a dedicated body for safeguarding civil liberties.

That all of these actions are carried out through distinct executive orders is a normal function of the genre. Typically an executive order seeks to exercise the existing presidential authority to ameliorate a perceived policy problem. What is remarkable in this series is that all of the orders were issued on a single day. This happened for two reasons. First, these executive orders responded to the shortcomings in the intelligence apparatus found in the 9/11 Commission Report. Second, even though each of these orders responded to different problems, they were envisioned as creating a

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[256] Bush, George W. *Executive Order 13356-Strengthening the Sharing of Terrorism Information to Protect Americans*. 27 August, 2004. Federal Register 69, no. 169, (2004).

comprehensive reform to create a new intelligence apparatus. This approach by the George W. Bush administration not only used existing power, but expanded on the power of the presidency to create the infrastructure necessary to pursue the terror wars.

That these executive orders work in concert to create a new apparatus is significant. Taken as the sum of their parts these orders appear to function to the same end but pursuing different means, at times overlapping and incongruous. For instance, executive order 13353 creating the board responsible for safeguarding civil liberties seems to be at odds with the need expressed in executive order 13356 for developing domestic intelligence gathering. Similarly executive order 13354, creating the NCTC seems to have an overlapping authority with executive order 13356 creating the ISC in that both bodies are responsible for gathering and disseminating intelligence.

Read as the sum of their parts these orders do not appear to lend a great deal of clarity about the nature of the new intelligence gathering apparatus. Reading them separately, which the issuing of all of these executive orders on the same day encourages critics to do, creates the perception that terrorism is now treated as a distinct realm of policy. This realm spans the domestic and foreign divide, and links both sides of the divide to the personal purview of the office of the president. These orders create a framework that accelerates the flow of information to the president, situating the executive branch as the unified actor situated to address the problem of terrorism.

This notion of a unified actor is distinct in a certain sense from the argumentative nature of the signing statement. Where the signing statement was used as an argumentative tool used by the George W. Bush administration, the executive order was

a constructive tool that called on the established power of the president to administer the executive branch to create a new set of agencies dedicated to the problems inherent in the terror wars. The consequence of such a maneuver was the creation of an independent element in the government beholden to the president. By definition these agencies were also subject to congressional oversight, yet Congress could not direct them or dictate policy for them. Instead, Congress was limited to observing an executive branch bureaucracy.

An important addendum to this collection should be noted. On October 25, 2005 the Bush administration released executive order 13388. This executive order, in addition to reproducing very nearly verbatim two sections from executive order 13356, shifted the responsibility for informing the president from the DCI to the newly created position of the Director of National Intelligence (DNI). Shifting the nexus for information distribution from the DCI to the DNI, and shifting the responsibility for reporting to the President weakened the institutional responsibility of the CIA and resolved a potential problem stemming from institutional resentment against the privileged relationship between the DCI and the president.

This points toward an important strategic tool for presidents provided by executive orders. They afford the possibility to give an evolutionary life to departments and agencies in the executive branch. Not just because executive orders can create those organizations, but because executive orders can be used to change the responsibilities of these organizations. In short, the executive order is a means for presidents, interested in unified control of the executive branch, to exercise dominion over the institutions that

otherwise could prove difficult. In the George W. Bush administration, this ability was used to reconfigure executive branch agencies to better facilitate a war on terrorism, rather than pursue broad foreign policy objectives.

The Obama administration took a similar approach, focusing on creating new institutions to address emergent problems. It is worth noting that the counterterrorism institutional infrastructure created under the George W. Bush administration was largely left in place by the Obama administration. Instead, an emphasis was placed on addressing more specific threats and problems that emerged from the concerns posed by terrorism, but intersect them with broader security concerns. It is worth noting that the Obama administration was more tentative in the use of this power, rarely taking action in this manner until the end of the second term of the presidency.

The first of the executive orders issued under the Obama administration that engaged in the creation of institutions was executive order 13541 which established a temporary organization to facilitate the strategic relationship between the United States and Iraq. This was not the first executive order of this type dealing with Iraq. President George W. Bush had issued a similar order, which was largely overshadowed in significance by the national security directives used by the Bush administration to create the institutions for the transitional government. The shift between the temporary organization created by President Bush in executive order 13431, which sought to support the transfer of material assistance to Iraq, and the temporary organization created by the Obama administration is significant. The Obama administration conceived of the

temporary organization it was creating as less a material assistance organization than as a mechanism for formalizing relations with the government of Iraq.

The description of the purpose of this organization demonstrates the subtle shift from Bush to Obama: "The purpose of the ISPO shall be to perform the specific project of supporting executive departments and agencies in facilitating the strategic partnership between the U.S. Government and the Republic of Iraq, in further securing and stabilizing the country, and in continuing an effective diplomatic presence in Iraq."[257] This purpose does not altogether disavow the ongoing work to develop the institutions of Iraq, but it foregrounds the purpose of developing a "strategic partnership." In so doing the purpose presumes a contradictory premise. Namely that the government of Iraq is substantially stable and autonomous, that it exists as a partner, rather than a client, of the United States that nonetheless is presumed to desire a partnership with the United States. The tension here is that while framing the government of Iraq as independent, the autonomy of such independence expressed in the possibility of a decision not to pursue a partnership with the United States is unacknowledged.

This is not a new problem borne of the Obama administration. Rather, it is a continuation of the aim of the George W. Bush administration discussed in the chapter on National Security Directives, that Iraq be reconstructed as a state that is intimately tied to the interests of the United States. The emphasis in the purpose described in executive order 13541 on "securing and stabilizing the country" provides a connecting thread with the language of the Bush administrations order for the need to continue

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[257] Obama, Barack. *Executive Order 13541-Temporary Organization to Facilitate a Strategic Partnership with the Republic of Iraq*. 7 May, 2010. Federal Register 75, no. 91, (2010).

"facilitating Iraq's transition to self-sufficiency." The difference in the language here is the specificity of the concern expressed by the Obama administration. Where the Bush administration focused on developing infrastructure and completing major projects to literally build the country, the Obama administration specifically emphasized security and stability. Presumed in such a wording is that there is already a government that can be secured and that its stability already exists to a degree that must be expanded.

The inherent difference between the Obama and Bush administration executive orders stems from the changing conditions in Iraq. By the time Obama comes to office the Iraqi government has been formed and is functioning, even if there exist legitimate questions of its stability and security that would become more genuinely pressing several years later with the growth of the Islamic State. Nonetheless, what the Obama administration is gesturing toward is the notion that at least in part the War on Terror has been completed. It is no longer an offensive war aimed at ameliorating the effectiveness of combatants, but rather a defensive war aimed at securing the success found in the government of Iraq.

Setting aside the importance of the particular framing of the purpose of this organization, the Obama administrations use of executive order 13541 demonstrates an important corollary to the insight into the way the Bush administration used executive orders to create institutions. If the rule of the George W. Bush administration is that the power to exercise executive orders to create new institutions provides the ability to address emergent policy problems, what Obama demonstrates is the ability of Presidents to use that same power to redefine ongoing policy problems.

Another demonstration of this corollary can be found in executive order 13550, establishing a temporary organization to support Pakistan and Afghanistan. This order was issued three months later and was intended to serve a similar function, but the purpose articulated a different exigency: "The purpose of the PASO shall be to perform the specific project of supporting executive departments and agencies in strengthening the governments in Afghanistan and Pakistan, enhancing the capacity of those governments to resist extremists, and maintaining an effective U.S. diplomatic presence in both countries."[258] The important term here is "extremists." This was similar to the move in executive order 13541 to word the order as if the countries in question have already established the capacity to function to a degree that must be expanded. The term "extremist" here describes that responsibility in terms of a specific threat. This wording couches the concern of the temporary organization in a much narrower sense. Which is defined by resistance to extremism. The term "extremism" here conflates at least three distinct threats. The first is the remnants of Al Qaeda still operating in Afghanistan and in part in Pakistan. The second is the remnants of the Taliban military, which still posed a substantial military threat. The third is an ambiguous threat posed by the possibility of a new organization or amalgamation of Al Qaeda and the Taliban. The term extremism here of course does not have any adjectives or modifiers that validates this extrapolation. Yet the concerns in Afghanistan and Pakistan at the time this order was issued could not fit a type other than extremism in the form of one of the threats listed above unless there was an absolute rejection of historical context.

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[258] Obama, Barack. *Executive Order 13550-Establishment of Pakistan and Afghanistan Support Office*. 23 August, 2010. Federal Register 75, no. 162, (2010).

What extremism stands in for here is connotatively associated with groups claiming an affiliation with the Islamic faith. The inherent problem in this vagueness is that it leaves undefined what constitutes extremism in relation to that faith. Toward that end, the autonomous decision for both Pakistan and Afghanistan to incorporate elements of the Islamic faith into their government is called into question. It is of no small consequence that Pakistan was created as a Muslim state separate from India by the British as the colonial government withdrew, and today is still officially known as the Islamic Republic of Pakistan. Similarly, Afghanistan is officially known as the Islamic Republic of Afghanistan. The question of extremism then is not a question of philosophical kind, but rather of degree. Such a slippery definition lends itself to flexibility and sovereign control for the United States in determining what outcomes are acceptable in both countries.

What the Obama administration accomplishes by defining the purpose of the temporary organization in this way is to frame the ongoing problem as one of extremism that is twofold. First, it creates an orientation against particular political formations in a manner that almost necessitates the United States prefiguring the political possibilities for two countries, including in the case of Pakistan a government that had been continuous, if at times unstable. Second, and more directly, the problem in Pakistan and Afghanistan is defined as one of extremism rather than terrorism.

This points toward a subtle shift in the rhetoric between Obama and George W. Bush generally. In his executive orders Obama generally works to avoid a focus on terrorism as a particular problem. There is no doubt that terrorism would fall into the

spectrum of extremism as one would understand the order. Nonetheless, the decision to focus on the threat of extremism rather than terrorism points toward a concern more generally for the stability and political nature of Afghanistan and Pakistan rather than on the particular problems that provided the exigency for the original U.S. military incursion. This points toward a broader effort by the Obama administration to end the use of the rhetoric embedded in presidential powers at the outset of the terror wars.

The most simple piece of evidence for this conclusion can be found in executive order 133656 issued four years later. This executive order established a new temporary organization to facilitate the relationship between the United States and Afghanistan and Pakistan: "The purposes of the APSPO shall be to perform the specific project of supporting executive departments and agencies in facilitating a strategic partnership between the U.S. Government and the governments of Afghanistan and Pakistan, promoting further security and stabilization, and transitioning to a normalized diplomatic presence in both countries."[259] Notably, this order removes the term extremism, and borrows the language of furthering security and stabilization from executive order 13541. Taken as a collection the executive orders issued to create these temporary organizations outline a rhetorical shift away from the language of the War on Terror toward a language emphasizing security and stability that demonstrates the importance of the function of executive orders to redefine problems.

This is not to say that Obama did not make some original interventions into institution building to address emergent problems. The Obama administration oversaw

[259] Obama, Barack. *Executive Order 13656-Establishment of Afghanistan and Pakistan Strategic Partnership Office and Amendment to Executive Order 12163*. 24 January, 2014. Federal Register 79, no. 16, (2014).

the emergence of a threat that was not entirely novel, but took on a new prominence. The use of the internet as a tool for terrorism emerged as a much greater security problem under the Obama administration as groups like Anonymous became notorious for acts of pranking and hacking including the hack of global intelligence firm STRATFOR, nation states began to become more aggressive in the use of offensive cyber weapons capability, and terrorist organizations such as ISIS became more active in using the internet to recruit new members. For the Obama administration cyber threats became an area for novel interventions.

This notion of novel interventions is somewhat complicated. It is not the case that the United States had no institutions dealing with cyber security. Almost all federal agencies with investigative power had an element that addressed concerns with cyber security. Notably, the Department of Homeland Security had a division dedicated specifically to the problems posed by cyber threats written into its statutory creation in the Homeland Security Act of 2002. For the Obama administration the task at hand was to find ways to facilitate communication and organization to deal with this threat.

The first executive order used to pursue such an intervention was executive order 13636. This executive order defined the emergent nature of the threat:

> Repeated cyber intrusions into critical infrastructure demonstrate the need for improved cybersecurity. The cyber threat to critical infrastructure continues to grow and represents one of the most serious national security challenges we must confront. The national and economic security of the United States depends on the reliable functioning of the Nation's critical infrastructure in the face of such threats. It is the policy of the United States to enhance the security and resilience of the Nation's critical infrastructure and to maintain a cyber environment that encourages efficiency, innovation, and economic prosperity while promoting safety, security, business confidentiality, privacy, and civil liberties. We can

> achieve these goals through a partnership with the owners and operators of critical infrastructure to improve cybersecurity information sharing and collaboratively develop and implement risk-based standards.[260]

Although the problem of cyberterrorism was not new, the Obama administration in this executive order aimed to make it appear new. To do this, references are made to recent intrusions that demonstrate the weakness of the existing system alongside the claim that the threat is growing rather than shrinking. In the same manner as the Bush administration attempted to describe terrorism as a new threat because of a perceived evolution, the Obama administration attempted to couch cyberterrorism as a threat that had changed so substantially that new mechanisms were required to meet it. This wording's attempt to inflate the perceived nature of the threat is reinforced by the emphasis on critical infrastructure, where "critical" implies that the significance of that infrastructure is so great that its failure would be catastrophic.

What becomes apparent after providing a justification for changing the policy is the balance implied in the articulation of the policy. The policy acknowledges that there are a number of different values in competition with each other, but an inherent set of priorities are articulated. The clause "to enhance the security and resilience of the Nation's critical infrastructure" indicates that the government will take action oriented to respond to the emerging threat. The two subsequent clauses provide lists that demonstrate the competing values that are called into being as the government will take action. The first clause holds that the policy should "maintain a cyber environment that encourages efficiency, innovation, and economic prosperity." This list of values

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[260] Obama, Barack. *Executive Order 13636-Improving Critical Infrastructure Cybersecurity*. 19 February, 2013. Federal Register 78, no. 33, (2013).

emphasizes the ability to maximize the use value of cyber space, especially from an economic point of view. The emphasis on economics is significant; it frames the concerns stemming from cyber security as not just physical security, but economic security, with the inference that the United States government has responsibilities to secure cyberspace for private entities. The second clause describes that this will be done, "while promoting safety, security, business confidentiality, privacy, and civil liberties." This approach is not necessarily contradictory, but they are in tension. It does not require a great deal of imagination to conceive of a case where a company that is data mining might well be conceived of as violating civil liberties, privacy, and business confidentiality while using the internet in a way that is efficient, innovative, and contributes to economic prosperity. From the government's perspective, to the extent that information is being gathered and shared between different government agencies about both individual persons and groups, the possibility for infringing on civil liberties and business confidentiality as a means of securing cyber space is very real.

Beyond the inherent tension between the values listed, the emphasis that one part of the list will be balanced against the concerns in another part of the list demonstrates the difficulty inherent for the Obama administration in defining the problem. As an emergent problem with numerous potential consequences for any government intervention aimed at improving cyber security there may well be a need to articulate the values at stake. The problem in the description of the aim of the policy to include and defend such a large list of values that are simultaneously being pursued is that it ignores the inherent contradictions that will arise. The problem is that without any criteria for

rendering decisions between these inherently contradictory values, much is left open to interpretation when decisions are rendered about implementing policy changes.

Which may be part of the reason that executive order 13636 did not seek to create new institutions. Instead, it aimed to improve cooperation between departments and agencies as well as cooperation between the government and the private sector. In so doing, it took a position that betrayed where the margin of error would likely be when the inevitable conflict arose. In section 4 the order concludes, "It is the policy of the United States Government to increase the volume, timeliness, and quality of cyber threat information shared with U.S. private sector entities so that these entities may better protect and defend themselves against cyber threats." The meaning here is clear; the government will err on the side of protecting the business interests where conflicts arise. In taking such a stance the Obama administration had charted a course toward securing cyber space.

Yet this aim was not backed up by the creation of new institutions, but rather facilitating the release of information by existing agencies. The next executive order issued to address cyber security, executive order 13691, similarly did not create any new organizations. Instead, it encouraged the creation of voluntary non-governmental organizations with which the government would collaborate to improve sharing information about cyber security. It is worth noting that this executive order included language directing department and agency heads to assess the impact of their activities on civil liberties. The language here does not necessarily mandate a change in policy, however.

The idea of using non-governmental voluntary organizations to improve information sharing on cyber security is a novel departure. Yet it did not carry with it any power beyond the sharing and analysis of information. It would not be until executive order 13718 that Obama would try to create new institutions within the executive branch to deal with cyber terrorism. The Obama administration created the Commission on Enhancing Cybersecurity within the Department of Commerce. The commission does not have new enforcement or investigative power, but has the authority to make recommendations to both Congress and other executive branch agencies. Nonetheless, this is a novel intervention in that it relies not on the creation of a new agency to enact policy, but rather on a commission to direct other agencies on how they ought to address a particular problem.

Ultimately, the Obama administration would not create a body dedicated to the threat of cyber security. Although the commission created within the Department of Commerce sought to address gaps in policy, it ultimately was largely advisory and did not implement policy. The Obama administration's response to cyber security as a whole dealt with institutional changes, but did not deal with the problem in a wholesale manner by creating new institutions with new powers. Yet by redefining the problem of cyber security, creating voluntary organizations to help raise awareness and share information regarding cyber security, and by creating a commission to create recommendations for addressing the problem posed by cyber security, the Obama administration demonstrated an alternative approach to shaping institutions.

The Obama administration however, did engage in the creation of new institutions to deal with cyber threats dealing more directly with the problems posed by terrorism. The Obama administration, in executive order 13584 issued on September 9, 2011, had articulated a policy of countering the communication strategies of terrorist organizations. As a part of this policy, a temporary organization called the "Center for Strategic Counterterrorism Communication" (CSCC) was created. The distinctive element of the Obama administration's policy is the emphasis on communication by the United States to counter the communicative strategies of terrorists.

The general thrust of these strategies is described by the order as focusing "not only on the violent actions and human costs of terrorism, but also on narratives that can positively influence those who may be susceptible to radicalization and recruitment by terrorist organizations." Put plainly, the Obama administration is seeking to create an organization dedicated to providing a counter-narrative to the recruitment strategies used by terrorist organizations. The Obama administration is explicitly stating a policy of propaganda to respond to the threat of terrorism.

The described purpose of this order gives a sense of the propagandistic function of the temporary organization that the Obama administration created:

> The purpose of this Executive Order is to reinforce, integrate, and complement public communications efforts across the executive branch that are (1) focused on countering the actions and ideology of al-Qa'ida, its affiliates and adherents, and other international terrorist organizations and violent extremists overseas, and (2) directed to audiences outside the United States. This collaborative work among executive departments and agencies (agencies) brings together expertise, capabilities, and resources to

> realize efficiencies and better coordination of U.S. government communications investments to combat terrorism and extremism.[261]

The purpose of this order makes clear how the Obama administration views the changing nature of the War on Terror. Where the previous administration had viewed the war as a military conflict, the Obama administration has a slightly wider view that emphasizes the importance of communicating ideas. Targeted primarily at al-Qa'ida the Obama administration is seeking to use "government communication investments" to fight terrorism not only militarily, but through persuasion.

This is not an altogether novel idea. Indeed, an unrelated Center for Strategic Communication had been created at Arizona State University to address similar concerns stemming from Terrorism in 2004. This center, unrelated to the one created by the executive order although perhaps providing inspiration for it, was a collection of researchers and tenured faculty at Arizona State University who sought to understand the communication strategies used by terrorists to advance their cause and develop countermeasures. The Obama administration framed the Center for Strategic Communication along the same lines.

The important difference between the Obama administration's center and the one created by Arizona State is that the Obama administrations agency had the responsibility to direct government action. This meant both coordinating communication activities and developing expertise, "using communication tools to reduce radicalization by terrorists and extremist violence and terrorism that threaten the interests and national security of

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[261] Obama, Barack. *Executive Order 13584-Developing an Integrated Strategic Counterterrorism Communications Initiative and Establishing a Temporary Organization to Support Certain Government-wide Communications Activities Directed Abroad*. 15 September, 2011. Federal Register 76, no. 179, (2011).

the United States." To do this the Obama administration sought to incorporate insights and personnel from the private sector, government, and academia.

The CSCC then began a program of producing primarily web based content designed to undermine the ISIS message. Initially relying only on Arabic language videos to provide a narrative emphasizing the violence of ISIS and Al Qa'ida, the CSCC changed course to begin including English language or mixed language content in late 2013.[262] As a part of this effort the CSCC began producing new videos and using twitter to try to directly respond to claims made on the site by ISIS in particular. The turn to mixed language messaging coincided with a turn towards more aggressive messaging.

The most notable example of the efforts by the CSCC may also have led to its downfall. In the summer of 2014 the CSCC released a video titled, "Welcome to ISIS Land." The video featured grisly images of violence by the Islamic State while text and audio invited the audience to "run, do not walk, to ISISland." Intended to be sarcastic, the video concluded with a still frame with the text "think again, turn away." The video itself was so inflammatory that members of the state department not in the CSCC expressed concerns that the video played into the hands of ISIS by playing their game of using scenes of dramatic violence. Moreover, when the story became public that the

[262] Miller, Greg and Higham, Scott. "In a propaganda war against ISIS, the U.S. tried to play by the enemy's rules" *The Washington Post*, May 8, 2015. Accessed online: May 6 2017. https://www.washingtonpost.com/world/national-security/in-a-propaganda-war-us-tried-to-play-by-the-enemys-rules/2015/05/08/6eb6b732-e52f-11e4-81ea-0649268f729e_story.html?utm_term=.ae835e074cfa

CSCC was engaging in a campaign of this nature to undercut ISIS, there was a large backlash from other parts of the government as well.[263]

In response to this negative reaction the Obama administration decided to restart the efforts altogether. Beginning with the firing of the contemporary head of the program, the Obama administration opted to create a new institution rather than follow the state department's plan to reform the center. Subsequently executive order 13721 was issued in March 2016 creating the Global Engagement Center. Notably, executive order 13721 revoked entirely executive order 13584. The decision to revoke the entirety of the previous executive order is remarkable in that it symbolically wiped the slate clean to begin anew the efforts at countering messaging by the Islamic State and Al Qa'ida. This decision to start anew is reflected in section one of the executive order explaining the purpose of the new organization:

> The Secretary of State (Secretary) shall establish the Global Engagement Center (Center) which shall lead the coordination, integration, and synchronization of Government-wide communications activities directed at foreign audiences abroad in order to counter the messaging and diminish the influence of international terrorist organizations, including the Islamic State of Iraq and the Levant (ISIL), al Qa'ida, and other violent extremists abroad with specific responsibilities as set forth in section 3 of this order. The executive director of the Center shall be the Special Envoy and Coordinator for Global Engagement Communications (Coordinator), who shall report to the Secretary through the Under Secretary of State for Public Diplomacy.[264]

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[263] Miller, Greg and Higham, Scott. "In a propaganda war against ISIS, the U.S. tried to play by the enemy's rules" *The Washington Post*, May 8, 2015. Accessed online: May 6 2017. https://www.washingtonpost.com/world/national-security/in-a-propaganda-war-us-tried-to-play-by-the-enemys-rules/2015/05/08/6eb6b732-e52f-11e4-81ea-0649268f729e_story.html?utm_term=.ae835e074cfa.

[264] Obama, Barack. *Executive Order 13572-Developing an Integrated Global Engagement Center to Support Government-wide Counterterrorism Communications Activities Abroad and Revoking Executive Order 13584*. 17 March, 2016. Federal Register 81, no. 52, (2016).

This purpose is notable in two respects. First, it explicitly acknowledges the Islamic State as a threat. The previous order, which predated the rise to prominence of the Islamic State had no such reference, but the CSCC had nonetheless targeted their efforts at that organization. This new organization is directly aimed at responding to the threat posed by Islamic State. Second, this purpose includes no reference to the previous organization. Although the subsequent section revokes entirely executive order 13584, this section makes no reference to it. Indeed, the general aims are expressed as congruent with the preceding organization. As a result the conditions of possibility for a return to such practices is left open because there is no institutional norm against it. The executive order issued by the Obama administration is not a repudiation of the CSCC, but rather an attempt to pursue the same goals by starting anew.

The responsibilities outlined in the third section similarly do not constitute a radical departure from what was found in executive order 13584. It includes coordinating the communication efforts of other departments of agencies, gathering and analyzing information about communication strategies used by Islamic State, Al-Qa'ida, and its affiliates, and the creation of original content. Ultimately, the executive order did not make a substantial change in the way the institution, its mission, or its responsibilities were designed. Indeed, only two changes were made that are of great consequence. First, there was a change in leadership. Second, the scope of the problem was expanded to include Islamic State.

The change in leadership is important. The appointment by the Obama administration of Peter Lumpkin marked a change in strategy. Rather than large scale

broadcast campaigns, Lumpkin focused on using more narrowed and tailored analysis. An example of this is the use of data analysis to target specific social media users who showed interest in the Islamic State. The GEC would then pay for ads targeting those specific users that featured comments by defectors and victims rather than more filmic depictions of violence.[265] This shift in strategy is more precise and targeted than the strategies developed by the CSCC.

For the Obama administration this shift is important in that it minimizes the likelihood of a negative reaction to the strategy. Yet there is an ideological element at play as well. A recurrent theme in how the Obama administration uses executive orders is the attempt to find more narrowly tailored technical solutions. Although the shift in strategy was not dictated by the executive order, it is a reasonably foreseeable evolution from the previous strategy and the change in leadership.

What this executive order demonstrates is that the executive order can serve a symbolic function that does not entirely reside in the text. Although the Obama administration created a new organization, the nature of the new organization on paper was no different. Yet by changing leadership and taking the symbolic action of revoking the preceding executive order, the Obama administration was able to effectively reframe the means by which the new organization pursued the same goals. The symbolic element of rescinding and issuing a new executive order combined with the contextual backdrop

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[265] Warrick, John. "How a U.S. team uses Facebook, guerilla marketing to peel off potential ISIS recruits" *The Washington Post*, Feb. 6, 2017. Accessed Online: May 7 2017. https://www.washingtonpost.com/world/national-security/bait-and-flip-us-team-uses-facebook-guerrilla-marketing-to-peel-off-potential-isis-recruits/2017/02/03/431e19ba-e4e4-11e6-a547-5fb9411d332c_story.html?utm_term=.9ac745eb730d

that of the previous organizations failure produced new norms that changed how that organization performed.

Public Power

Executive orders figured prominently in how presidents Bush and Obama addressed the terror wars. The long standing presumed legitimacy of the executive order along with the greater public awareness of their function gave both Presidents a remarkable strategic tool for navigating public opinion while dramatically changing policy and the form of the executive branch. Although both Presidents put executive orders to different ends politically and had subtle characteristic differences in the text of the executive orders used, the instrumental forms were largely the same. The reason for the nature of this similarity and difference flows from the intersection of genre and ideology.

In the case of both presidents, executive orders were used to exercise generally accepted presidential powers. As a result, presidents relied on citations either to previous exercises of power or to specific writs of authority to give legitimacy to the changes they advocated. This is not to say that there were no important changes, but these changes demonstrate the nature of citationality rather than disprove it. The cite is a source of authority, that the President then uses to act against the limits of that citation either by commanding change. The way in which the President goes beyond the limits of the cite is determined by a political choice.

Inherent in the use of executive orders is a two-level discussion of genre. The first is what sets the executive order apart from other presidential powers as a distinctive

genre. The second is how the use of executive orders to pursue particular types of policy changes also constitutes a genre. The genres of executive order created by policy changes constitute both a source of authority that has an eminent relationship to their exercise, and a particular rhetorical form that is innate to the production of power. As presidents issue executive orders of a particular type they both reproduce the form of the existing executive orders of a similar type and use the form of that power to enact their vision of the executive branch.

Despite the similarity in the forms of the executive orders used by Presidents George W. Bush and Obama, there are important and distinct differences, with notable ties to how presidents perceived threats differently and the political beliefs they held. For President Bush the executive order was a quick, efficient, and public means of reconstituting the executive branch to deal with the problem of terrorism. This reconstitution emphasized the development of dedicated agencies and departments to deal with the problem of terrorism. The creation of the Department of Homeland Security provides a premier example of presidential leadership that prompted Congress to follow him. By contrast, the attempts to defend the indefinite detention and interrogation programs demonstrated how executive orders could be used to circumvent congressional opinion. In both cases, what the Bush administration seeks is to demand and defend broader changes in the political system by alternately leading Congress and working to subvert its will.

The language used in the executive orders reflects the nature of this strategy. The persistent description of terrorism as a particular problematic threat requiring a rethinking

of government is the hallmark for the Bush administration executive orders. For Bush, the executive order is a tool that allows the President to define the problem, define the tool used to resolve that problem, and create a public norm and sensibility supporting that organization. In this way, the interrogation program, even if formally curtailed in some respects, is able to continue because the Bush administration does not define the critique of that program as a problem to be addressed that is more pressing than the problem of terrorism. Ultimately, the Bush administration remains committed the notion of an independent and powerful executive branch that is able to determine national policy in very broad strokes with limited influence from the congressional branch.

The Obama administration did not repudiate these powers and occasionally relied on them. Yet in general the Obama administration rarely relied on the use of executive orders in the broad and far reaching manner used by the Bush administration. Instead, the Obama administration preferred to use more precise and narrowly tailored interventions designed to retain the existing structure of the executive branch, preferring to tweak policy at the margins. With the notable exception of the creation of the CSCC, Obama tended to avoid the creation of new institutions and preferred to use direction of existing bodies as a means to promote policy change. In part this could be because the Obama administration inherited much of the infrastructure from the George W. Bush administration. Yet even when conditions seemed appropriate to do so, the Obama administration opted not to create new institutions pointing toward a preference for more limited applications of presidential power.

This shift in the view of presidential power is reflected in the rhetoric used in the executive orders issued by the Obama administration. Apart from the rhetoric used to create communications strategies to respond to terrorism, the term almost disappears altogether from the executive orders issued. Instead, the Obama administration focused on precise outcomes of terrorism or drivers of it, attempting to, reduce the role of terrorism as both a motivating threat and driving force for the conflicts facing the United States throughout the world. In part, this is because the terror wars evolved dramatically during the Obama administration, as troop deployments surged and withdrew, as drones became more widely used, and the threats changed and took on new forms. Nonetheless, Obama refrained from returning to the language of terrorism in the face of these emerging threats.

That is not to say that the rhetorical forms and techniques changed altogether. Obama treated the term "cyber security" much as Bush treated the term "terrorism." Nonetheless, the Obama administration, in general, opted to pursue a different path in the terror wars. This path was defined not by the expansive use of power, but instead by the more measured use of it in satisfying more narrow policy concerns. The Obama administration retained the power of the office, but showed a different political commitment to how that office ought to be used.

The similarities between the terror war Presidents are ultimately greater than the differences when they are situated within the concept of sovereignty. For both Presidents, the executive order provided the ability to assert a change in policy by stretching the constitutionally imbued powers of the office. Even within the creation and

administration of federal agencies the language indicates a source of legitimacy that exists outside of statutory authority. Instead of being understood as independently functioning agencies, they are couched as extensions of the executive branch that follow the branch in existing apart from the constitutional order.

The implication of this is perhaps most potent in the extension of presidential sovereignty beyond the borders of the United States. In the agencies used to administer to the U.S. backed governments of Iraq and Afghanistan there was a clear understanding that the Presidents would retain a great deal of power not just in determining how the U.S. related to those countries, but the nature of the governments that would be permitted and who would populate them. For both Presidents, the notion that Iraq and Afghanistan would have genuine sovereignty was problematic, and the executive orders issued to the agencies responsible for facilitating U.S. relations to those governments reflected just such a view.

For both terror war Presidents the executive order provided a genre of presidential powers that was public and largely accepted as an institutional practice. To best take advantage of this both Presidents relied on drawing together declarations of emergencies, citing sources of authority, and the use of declarative language to reinforce the legitimacy of their actions. At the heart of this move was an attempt to assert sovereignty by operating outside of the purview of the other branches. In so doing, the terror war Presidents limited the possibilities for a constitutional response to take place.

Chapter 5: Conclusion

In light of the preceding chapters there seems to be little that can be done to address the problems posed by presidential powers. Even when other parts of the government such as Congress or the Courts have attempted to circumscribe the scope of presidential action both Presidents George W. Bush and Obama have used presidential powers to either to co-opt such efforts (in the case of signing statements), to avoid such efforts (in the case of presidential policy directives), or pre-empt such efforts (in the case of executive orders). The efforts by the terror war Presidents to use presidential powers to defeat the system of checks and balances have proven so successful that there seems to be little that can be done. In this conclusion I demonstrate that while the situation is not hopeless, the scope of the problem requires an immense and concerted response that is fraught with genuine risk. Yet considering the outcome of the most recent election the time appears to have come for desperate measures.

One of the persistent refrains throughout this project has been that Presidents need to seek sources of legitimacy for their use of presidential powers outside of the Constitution. In pursuing the terror wars Presidents have redeployed the lesson of the rhetorical presidency that not all power flows from the Constitution. Through the aggressive and skillful use of language the scope of the presidency can be expanded beyond the bounds of the Constitution. This skill, as described in the preceding chapters, is in the strategic use of particular genres of speech that are tailored to take advantage of powers afforded to the presidency by custom as much as by law. In some cases, such as

signing statements, these are new genres pioneered for the express purpose of pursuing the terror wars. In other cases, such as PPDs, these are techniques that are old, but have been applied in very specific ways to limit the response from potential dissenters. In still other cases, such as executive orders, these techniques are used to draw together disparate discourses which are rearticulated to assert the sovereign role of the presidency.

The decision to use the events of September 11 to legitimate the expanded use of presidential powers was not only a response to a contingent threat, it was an attempt to satisfy a long standing ideological commitment to presidential sovereignty. Defined by Unitary Executive Theory (UET) this is the notion that the presidency and federal agencies must act in a unified manner that Congress, the courts, and the public should not, and cannot, constrain. This theory, explicit in the George W. Bush administration, was used both to legitimate the decisions of the administration and as an ideological guide for what the appropriate response to the crisis ought to be. A commitment to sovereignty is implicitly tied to UET in that it posits the importance of the role of the President as a body responsible for making the final determination regarding the security situation facing the country and the policies that govern that situation. This commitment is explicit in the rhetorical practices of the terror war Presidents' assertions of the primacy of the executive branch through presidential powers.

The problems posed by UET and its philosophical position in sovereignty theory have not gone unnoticed. Obama, as a candidate for the 2008 election, explicitly vowed not to use signing statements, yet found himself unable to resist their temptation when he entered the White House, even if his commitment to UET and presidential sovereignty

was not as strong as his predecessor's. Scholars of the presidency have similarly struggled to create an intervention that had hope for practical change. The two divergent approaches, Neustadt's emphasis on the individual president and their ability to take action through personal appeal with scholars of rhetoric as pleasant fellow travelers and constitutional scholars efforts to locate the presidency as an office with its functions preordained in the text of the Constitution, seem to have difficulty reconciling themselves to how the terror war Presidents have performed the office. For the first group, the personality of the president is unable to account for the operation of presidential powers, which are not reliant on the popularity of the president in order to have effect. For the second group, thinking of how the presidency can gain power from sources of legitimacy outside the Constitution is difficult without an account of rhetoric that undermines the authoritative role given to the Constitution. The changing configuration of language and power inaugurated in the terror wars is difficult to critique within existing modes of scholarship in much the same way that it is difficult to use the existing political framework to change it. Where the President operates outside the constitutional order but is imbued with the force of it, there are few means of rebuttal.

To respond to the problem of presidential powers as actions which have the force of law yet operate through language, I have synthesized the sensibilities of the rhetorical presidency to speech act theory to explain how the use of presidential rhetoric shifts from persuasion to action. Traditionally the rhetorical presidency was defined by public address, relying on perlocutionary speech that prompts others to act through persuasion. In my analysis, it is clear that presidential rhetoric has shifted from traditional forms of

public address toward the use of presidential powers that function in an illocutionary manner that derive their power from the social norms surrounding the genre of presidential power which the President opts to use.

Both terror war Presidents applied the genres of presidential powers in novel ways to advance their policy agendas. Although the use of genre analysis is focused on the development of classifications of presidential action, these classifications should not be understood as mere taxonomies. Each genre is a particular tool with its own norms for how it must be performed to have its desired effect. These norms do not exist in a vacuum, and are not rooted in the objective status of a written rule. Rather, these norms are developed as Presidents selectively use presidential powers to accomplish similar goals. In each use a President is engaged in a practice of iterating a new state of affairs, while citing past actions and creating a citation for future actions. In other words, presidential powers are remarkable because they combine the power of speech or iteration with the power of writing or citation. They both perform the speech act that inaugurates a change in a state of affairs and validate the empirical presence of the author even where the author is no longer in a position to reiterate the speech act.

What the genre analysis illuminates in the study of presidential powers is that there are few things an ambitious President cannot accomplish through the tactful use of presidential powers. Each genre of presidential powers provides its own unique affordances and corresponding form that can be used as a heuristic to explore not only the action which the President takes, but also the ideological commitments driving the decision to pursue those policies. What is particularly interesting in the genres analyzed

here are the ideological commitments are not limited to specific policies, but rather to the genres themselves. Each of the genres analyzed is an example of a larger ideological commitment the propriety of distinct forms of presidential power. What is of particular concern in this ideological commitment is not just the empowerment of the President, but that the empowerment is both earned and exercised through the proper performance of speech acts.

I argue that it is not merely a coincidence that Carl Schmitt defined the sovereign as "he who can declare the exception." The very act of declaration is itself a speech act, one that not only informs an audience of a state of affairs, but also inaugurates a change in a state of affairs. In the case of the terror wars there were, depending on how one defined the term, any number of declarations that could fit under Schmitt's definition. It is tempting in that context to search for the singular declaration that created the exception necessary for all the exercises of presidential powers that followed, but such a search would overlook the evidence in the documents issued by the terror war Presidents illustrating that there was not one declaration that authorized all presidential action; rather, each action was its own declaration. The declaration of an exception need not take the form of the wholesale suspension of the Constitution (although that would certainly qualify); it exists in the presidential decision to pursue unilateral action based on the exceptional nature of the threat and the exceptional power of the office.

Emphasizing the practice of exception taking on a smaller scale as an assertion of presidential sovereignty demonstrates an important aspect of contemporary presidential practice. Namely, that the exercise of sovereignty is not in the wholesale creation of

policy, but through strategic interventions that allow the President to shape policy by taking advantage of the decisions made by the other branches. This means that the sovereign presidency is defined by the authority to exercise the final decision over the actions of the other branches rather than the authority to legislate freely. This is reflected in the inability of the other branches to effectively respond to the use of presidential powers. For example, Congress could exercise the "power of the purse" and choose not to fund the actions of a president, which is exactly what Congress did in attempting to block Obama's efforts to end detention at the Guantanamo Bay facility. It is also what Congress did in its attempt to close Guantanamo Bay against the practices of the Bush administration in tying funding for the war effort to the President changing the policy on the treatment of detainees. Notable here is that one effort, to block Obama, was only successful to a degree, while the effort to stop the George W. Bush administration was a complete failure. My argument is not that these operations by Presidents are unassailable, but rather that the success of those operations is provisional and does not provide a broader response to the authority of the presidency.

Moreover, Congress faces serious barriers to even a limited response. The possibility of presidential success in countermanding congressional action raises the stakes to a degree that might be undesirable. The failure of Congress to succeed in blocking the George W. Bush administrations detention practices, for example, demonstrated the supremacy of the presidency in its success, and limited the perception of Congress as a body that could constrain the presidency. The same can be said of the courts. Despite issuing decisions overruling the presidency on the questions of habeas

corpus for detained persons, there was no meaningful change in the practice of detention at Guantanamo.

Another alternative is attempting to attack specific genres of presidential power. The empirical example of just such an effort was the short-lived bill authored by the well-known aggressive Republican (and later Democrat) Senator "Snarlin'" Arlen Specter who, in the wake of the controversial signing statement issued by the George W. Bush administration in response to the Detainee Treatment Act, enlisted the help of Reagan administration Deputy General Bruce Fein in drafting the Presidential Signing Statements Act of 2006. The bill he introduced would not ban the signing statement as a practice, but instead would instruct the courts to ignore signing statements and allow Congress to sue the executive branch before the Supreme Court. In short, it would have allowed the president to issue signing statements as a means to convey their view of the legislation, but that view would not have the force of law. Additionally, if the President attempted to use a signing statement to interpret legislation contrary to the intent of Congress, then Congress could in turn sue the presidency in order to have the Court strike down the statement as unconstitutional, much like they would an executive order.

The bill turned out to be a hollow hope. Despite Specter's best efforts to raise public awareness about signing statements through the use of congressional hearings and public statements, the bill barely moved from the moment it was introduced. When it was referred to the Senate Judiciary Committee, which was chaired by Arlen Specter, the bill failed to make it out of committee before the end of the congressional session and expired. When it was reintroduced in 2007 the bill died in committee, and Snarlin

Arlen's attempt to intervene against the use of signing statements died without even a whimper. Yet even if it had not died in committee, had survived debate and amendments in both houses of Congress, to be passed intact the bill had two major problems: it would be subject to either a veto, or in a disheartening twist, a signing statement by the George W. Bush administration that would likely prevent it from taking effect. Additionally, as Gilman notes, the bill itself would likely have been ruled unconstitutional by the Courts, as there exists a strong precedent against legislators standing to sue the President on the basis of non-enforcement (136-141).[266] From the outset the bill was doomed to fail in a system that made passage difficult, enabled the President to block the legislation, and the precedents that guide Court decisions were aligned against the bill. There were- and are - simply too many barriers built into the typical legislative process for there to have been a genuine hope for meaningful change there.

This failure emphasizes the importance of thinking beyond provisions in the Constitution itself. Considering the remarkable power exercised by Presidents described in the preceding chapters when making foreign policy determinations that suspend the normal functioning of government in order to pursue their policy agendas, the Constitution is clearly not a potent constraint. Indeed, in declaring emergencies, making decisions about the treatment of what they deem to be legal non-persons (in the case of detainees), and directing the military, the terror war Presidents made arguments to suspend (in substantial ways) the constitutional order. The power of the sovereign position rests not only in the ability to maintain a position of primacy in relation to the

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[266] Gilman, Michele Estrin. "Litigating Presidential Signing Statements," *William and Mary Bill of Rights Journal* 16, no. 1, art. 10, (2007): 136-141.

other branches, but also in the ability to determine when the legitimacy of actions by those branches no longer carries the force of law.

It is for this reason that in his analysis of sovereignty Agamben foregrounds the relation of the sovereign and the order as a ban. The sovereign, in his view, is always outside of the constitutional order in that it can declare that order illegitimate without delegitimizing itself. To be outside the order, Agamben notes, is not merely to be excluded by the law, but abandoned by it (23).[267] In declaring an exception to the constitutional order, Presidents are not merely exempting themselves from the law, but place themselves in a position where the law has no relationship to them. For this reason attempts to place the presidency in the Constitutional order, such Specter's signing statement bill, not only lack potency, but also fail. Attempts to constrain the presidency by returning to the older constitutional configuration are doomed, because the terror war Presidents have already laid claim to an ability to invalidate just such an order.

Of importance here is the specific implication of having such a sovereign body in government. The sovereign body has the ability to designate what is inside and outside of the order, what lives are and are not protected under the law. As Agamben points out, the decision to pursue the practice of indefinite detention exemplifies such a practice (3-4).[268] By exercising sovereign power to render determinations on the inclusion and exclusion of bodies through speech acts, the sovereign is able to determine what the nature of the constituency is. This is not only the case when the lives of individual

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[267] Agamben, *Homo Sacer: Sovereign Power and Bare Life*, 23.

[268] Agamben, *State of Exception*, 3-4.

persons are in question, as with detainees, but when the actions taken by Congress, the courts, or the public are dismissed through the use of sovereign decision making power.

Yet the presidency could not exercise this power without finding a source of legitimacy with roots outside the constitutional order. This legitimacy presents itself in what Agamben identifies this as biopolitics, or the politics of life (6-8).[269] By determining which bodies exist inside and outside the order, the sovereign draws power from a constituency that it defines for itself. This source of legitimacy is particularly problematic because, as in the case of detainees, those that are excluded to legitimize the sovereign are consigned to a state where any evil can be committed against them. Moreover, because this source of legitimacy exists outside of the provisions of the Constitution, it authorizes the sovereign to supersede the Constitution when the lives of those constituted by the order are threatened.

Put more plainly, the development of sovereignty within the framework of the Constitution is dangerous. The threat to security, as demonstrated in the terror wars, provides the basis for the sovereign to suspend the order. This is not always done through sweeping declaration, but the consequences are nonetheless violent and difficult to reverse because the existential justification for the sovereign power rests in the desire to secure the population. To secure that population, the exception exists as the means to initiate far reaching and intrusion on the normal functioning of the state required to mobilize the population against the perceived threat. Indeed, the presidency could not exercise this power without finding a source of legitimacy that has its roots outside the constitutional order. It is this concern that preoccupies Agamben's analysis. That the

[269] Agamben, *State of Exception*, 6-8.

concept of sovereignty exists outside of the constitutional order has its foundation in something more fundamental, what Agamben identifies as the politics of life, creates a means for the sovereign to exercise a greater degree of power (6-8).[270] To counteract, or respond to this conception of a sovereignty requires thinking outside of the constitutional paradigm in a foundational manner.

Resisting the Presidency

Resisting the power of the presidency has never been a simple matter. The times when it has been attempted have either proven to be ineffective, or at the very least, were not enduring. The impeachment of a President has never succeeded, and the one time that a President was forced from office it was under such a mountain of conclusive evidence that it is hard to imagine another President making such a mistake again. The War Powers Resolution has not proven to be an enduring constraint, and the bill from Specter that attempted to curtail the use of signing statements was effectively smothered in its crib. Clearly, the normal modes of resistance have little hope of success in our current constitutional situation.

Although a specific prescription for what is to be done may require a longer engagement than is favorable here, the characteristics of just what type of response is necessary can be described as the lessons from the preceding chapters are clear: an attempt to pursue simple legislative change or using the courts to legally enjoin the presidency is unlikely to curtail presidential power, even if a particular policy is blocked. If an enduring change is to be attempted it will have to reconfigure the entirety of the

[270] Agamben, *State of Exception*. 6-8.

constitutional framework of the United States, and it will require a prolonged effort over many years; and most importantly, the power to create such a change will have to come from outside the government.

A cursory glance at the Constitution demonstrates where such a power outside the constitutional order might arise. It is present in the language of the preamble: which begins, "We the People." This language points towards the important insight that, for the constitutional order to exist, it must have a constituency. Despite this acknowledgement of the power of the public, the stark absence of a role for the public in governance leaves a space for the public exercise of power outside the constitutional order. This space, theorized by Benjamin, perhaps offers a different approach to sovereignty that responds to the presidency. This notion, for lack of a better term, might be termed "popular sovereignty".

To situate popular sovereignty outside of the Constitution requires two important insights be established. The first has taken up the majority of this project, illustrating that sovereignty exists outside the Constitution. I have demonstrated this by explicating the operations of sovereignty, the exercising of power outside the Constitution that nonetheless has the force of law. The emphasis in this work on genres of speech, and how those genres work differently, traces those operations as performed by the executive branch. Unfortunately, absent a modern day Cincinnatus willing to lay down the power of the office, a change from the branch imbued with the peculiar access to power outside the Constitution is unlikely.

That the presidency has grabbed sovereignty is not an accident of history. Historical norms, both foreign and domestic, have afforded the presidency a privileged relationship to sovereignty that the terror war Presidents have used to expand the interpretation of the Constitution to empower themselves and their office. This privileged relationship to sovereignty does not preclude other bodies excluded from the constitutional order from grasping it, although it does mean that any alternative claim on that power must be opposed to presidential sovereignty.

The second insight that we must establish is that the constituted population needs to able to gain access to sovereignty. This follows naturally from the premise that sovereignty resides outside of the constitutional order because it retains the authority suspend it. To that extent, sovereignty does not rely on a body existing within the constitution to lay claim to it. Instead, sovereignty resides within the body that lays claim to an ability to interrupt the constitutional order, to declare an exception that suspends the current order and, in this case, must refashion it. Indeed, the task of constraining the presidency will be revolutionary.

Yet revolutionary in this context would be different from the sense inferred by the history of the U.S. revolution, or even that of the Civil War. Instead, this would be a revolution in thought, language, and ultimately the constitutional order, that seizes sovereignty away from the presidency. Such an endeavor would be neither quick nor easy, but is the only option. Fundamental change is necessary, and if it is to succeed it must produce a new government that has profound differences in terms of the

constitutional configuration, and foregrounds the role of the public in shaping its configuration.

The notion of a sovereign power outside the Constitution is already well established in political thought in the United States. Larry Kramer argues pointedly that for most of U.S. history, the predominant mode of constitutional interpretation has arisen from "popular constitutionalism," which foregrounds the role of the public in interpreting the Constitution and in considering whether those empowered to interpret the Constitution (the judiciary) really ought to retain such power (959-960).[271] Kramer writes against a specific vision of constitutional thought that is preoccupied with the notion that the courts, and especially the Supreme Court, have the supreme right to interpret the Constitution.

What is telling in Kramer's analysis of the development of popular constitutionalism is its connection between culture, politics, and constitutionalism. What he formulates is an explanation of popular constitutionalism that fills in the gaps between the Constitution, law, and the functions of the government. As he explains:

> Popular constitutionalism is the mechanism that mediates between constitutional law and culture. It is how we ensure that the spirit of our Constitution remains consonant with the society it is supposed to govern. Even accepting that the new interpretations become "law" only after judges have given them the final stamp of approval, a self-conscious popular constitutionalism is the engine that generates and shapes the interpretations, that makes them seem plausible (or not), and that, in this way, keeps constitutional law vital (983).[272]

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[271] Kramer, Larry. "Popular Constitutionalism, circa 2004," *California Law Review* 92, no. 4, (2004): 959-960.

[272] Kramer, "Popular Constitutionalism, circa 2004," 983.

Although his particular framing is preoccupied primarily with the position of the Supreme Court in constitutional interpretation and thought, Kramer's analysis authorizes a further step: to the extent that the presidency has taken over in significant ways the interpretation of the Constitution in order to direct executive agencies, the role of the court has been largely usurped. Kramer's argument makes the important point that popular constitutional thought can serve a mediating role in the articulation of the law and the Constitution that helps to validate interpretations of both. In short, in the same way that the public has historically influenced (and in some ways overruled) the text of the decisions of the court, the public can call into question the role of the presidency.

Another important insight garnered from Kramer's description is the notion that popular sovereignty determines which interpretations are legitimate. Without popular consent, the interpretation of the Constitution deployed by Presidents would not be sustainable. Toward that end, the public sensibility about the proper role and position of the presidency matters, although the problem is determining how much. Because the president has authority over agencies, and can enforce its decisions without the permission of the other branches, it short circuits in some ways the mediating role of the public. As evidenced by the actions of the terror war Presidents, executive branch supremacy limits the influence of the public political reaction by exercising direct control over executive agencies.

Despite this short circuit, Kramer's insights are still valid. That there exists an alternative form of constitutional thought that is not merely institutional, but public and popular, points toward the importance of developing cultural norms. That popular

constitutionalist thought, for example, ties the Constitution as a text to the society which it is supposed to govern, provides an alternative way to approach the problem facing the public and critics of the presidency. The position of the president as interpreter in chief is not objectively given, but is a contingent fact born out of historical forces that are subject to change.

Focusing more specifically on the concept of sovereignty as a fundamental question for political theory Andreas Kalyvas develops a concept of "constituent sovereignty." For Kalyvas the notion of sovereignty is distinct from the understanding that foregrounds much of the preceding work. Rather than focusing on sovereignty defined by the power to interpret the existing Constitution, Kalyvas defines sovereignty based on the ability to institute an order through the giving of laws (226-227).[273] In this view sovereignty is not only framed as the repressive function of suspending the legal order described by Schmitt and Agamben, but also includes the power to found a new legal order that legislates rather than rules (227).[274] Inherent in the distinction between legislating and ruling is the notion of a public formation of decisions, rather than the private rule inherent in presidential sovereignty. Constituent sovereignty then serves a productive and more openly democratic function. As Kalyvas notes:

> In all its theoretical expressions the constituent power has always been placed underneath the civil and legal edifice. The various names used to designate it – 'the multitude,' 'the Community,' 'the People,' 'the Nation' – suggest, in the last instance, the utter limit of any politics, a politics that survives the dissolution of governments, the disruption of legal systems, and the collapse of instituted powers (227).[275]

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[273] Kalyvas, Andreas. "Popular Sovereignty, Democracy, and the Constituent Power," *Constellations* 12, no. 2, (2005): 226-227.
[274] Kalyvas, "Popular Sovereignty, Democracy, and the Constituent Power," 227.
[275] Kalyvas, "Popular Sovereignty, Democracy, and the Constituent Power," 227.

The gesture in Kalyvas' work toward the constituency as a polity that survives the particular government that is placed under the civil and legal edifice is a gesture toward a concept of sovereignty outside the Constitution. By having the ability to exist and exercise power outside of the traditional political system the constituency is not merely a collection of people that are inherently bound to the legal order, but rather a body that operates in a similar inside/outside distinction as described by Agamben. Where a legal order exists, it only exists in relation to a constituency that it serves, where a legal order is suspended its suspension is only possible where the polity accepts the suspension.

What Kalyvas suggests is that the constituted will always outlive the Constitution. The public does not cease to exist should the constitutional order dissolve. Instead, they would exist as a body that exercises self-sovereignty in the absence of a Constitution empowering others to rule on their behalf. At stake in this modified approach to sovereignty is an emphasis on sovereignty from the bottom up that always exists both inside and outside of the constitutional order it creates (227-228).[276] This trait intimately binds the notion of a constituent sovereignty to democracy.

Kalyvas argues that this link is established through a notion of legitimacy. A constituent sovereign is able to exercise the full force of sovereignty, to interrupt the constitutional order, in moments when the legitimacy of that order is in crisis (237-238).[277] Of particular note here is the case of the actions taken by the George W. Bush administration in its attempt to create a new government in Iraq. In attempting to posit a government for the Iraqi people while excluding the people from the government, the

[276] Kalyvas, "Popular Sovereignty, Democracy, and the Constituent Power," 227-228.
[277] Kalyvas, "Popular Sovereignty, Democracy, and the Constituent Power," 237-238.

constituency was arbitrarily limited and, from the outset, the constitutional order that had been created faced a problem of legitimacy. As Kalyvas notes, "Should a person or group appropriate the power to constitute a legal order at the exclusion of those who will be its addressees, the ensuing constitutional document should be regarded as invalid, unauthorized, the result of an arbitrary act of usurpation that violates the normative prescription of the constituent act (239)."[278] As noted in the chapters on presidential policy directives and executive orders, attempts to do exactly what Kalyvas describes faced substantial resistance from the Iraqi people that has plagued the Iraqi government from its founding.

What requires nuance in the U.S. case is the way the constitutional order in the era of the terror wars has changed. Whereas in Iraq the creation of a new order fits well within Kalyvas' prescriptive and descriptive claims about legitimacy growing out of democratic participation, the United States from the outset of the terror wars had its own constitutional order. The problem created by the terror wars was not of constituent creation of a constitutional order from scratch. The problem was that the existing constitutional order had inherent problems. In providing language that Presidents over time were able to use to expand the power of the office, the constitutional order contained the seeds of its own decline in legitimacy.

The terror wars brought these problems before the public in the controversial decisions made by Presidents George W. Bush and Obama that excluded public engagement in the determination of the constitutional questions created by pursuing aggressive foreign wars. The result was a legitimacy problem perceived by the public in

[278] Kalyvas, "Popular Sovereignty, Democracy, and the Constituent Power," 239.

opposition to the George W. Bush administration, and later to a lesser degree, the Obama administration. The constituent power was not satisfied by the formal practice of voting when the constitutional order itself was made subject to dramatic change in order to pursue the terror wars. In focusing on the legalistic approach to the constitution put forth by members of the administration including John Yoo, the Bush administration missed the importance of constituent power, and as a result was perceived as undemocratic and illegitimate despite the presence of (limited) formal democratic mechanisms such as elections.

This view is accounted for even in texts that are defensive of the Bush administration. As Knott notes (without a taste of irony) in his defense of the Bush administration, the backlash against Bush was rooted in a criminalization of politics defined by the rejection of the propriety of his rule (168-170).[279] Yet Knotts' view is a fundamental misunderstanding of the distinction between constitutional sovereignty and legal sovereignty. Forgetting that the presidency's legal sovereignty can only be legitimate if it serves a sovereign constituency, Knott is unable to come to grips with the possibility that the failing of the Bush presidency to attend to the constitutional understandings of the constituency were sufficient to delegitimize that presidency in the eyes of the public. Similarly, in defending the Bush administration's changes in U.S. grand strategy as an example of "moral democratic realism,"[280] Kaufman ignores that the essential problem was that the academic community and the public constituency had different understandings of what constituted "moral," "democratic," and "realism."

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[279] Knott, *Rush to Judgment: George W. Bush, the War on Terror and His Critics*, 168-170.
[280] Kaufman, Robert G., *In Defense of the Bush Doctrine*. (Lexington: University Press of Kentucky, 2007), 87-88.

The early reviews of the Obama administration point toward a sense that even if the Obama administration had a more enlightened approach, the same pitfalls that befell the Bush presidency would prove pervasive. As Fitzgerald and Ryan note, the decision to surge and withdraw from Afghanistan presented the appearance of sensitivity to a constituency that had certain visions of what ought to constitute the policies and constitutional form of the country, even in war. Yet, as they note, the Obama administration in withdrawing did not end the war, and U.S. involvement continued largely through the use of drones, which are themselves unpopular with much of the public (86-88).[281] As Bernstein points out in his scathing conservative critique of the Obama administration, there is hypocrisy in using presidential war making power through drones to avoid congressional approval and oversight (42-43).[282] This constitutional problem may not have received the same widespread criticism faced by the Bush administration, but did have moments of public notoriety such as the filibuster by Rand Paul.

In the case of both Presidents there was a distinct lack of consideration for the role of the constituent sovereignty. The consequence in both cases was a sense that the presidency was no longer serving the will of the people, and had therefore lost its legitimacy. Even so, the problem inherent in Kalyvas' approach to constituent sovereignty is that even when the public was discontented, it still lacked the will to engage in the sort of radical resistance to the presidency inferred by constituent

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[281] Fitzgerald, David & Ryan, David. *Obama, US Foreign Policy and the Dilemmas of Intervention*. (London: Palgrave McMillan, 2014) 86-88.

[282] Bernstein, David. *Lawless: The Obama administration's Unprecedented Assault on the Constitution and the Rule of Law.* (New York: Encounter Books, 2015) 42-43.

sovereignty. It may be, as Nelson notes, that cultural attachments to the President as a democratic figure undermines the possibility for a critique of the presidency to prove politically potent (12-13).[283] That there is a cultural attachment to the presidency as an office would certainly explain why even if objections to particular presidential actions are raised there has not yet been the sort of response to the office of the President that is needed. In a similar vein, Beaumont argues that the history of popular constitutionalism is largely unacknowledged (2).[284] This failure to acknowledge the history of popular engagement with the Constitution certainly contributes to a lack of public consciousness of the constituent role in legitimating or criticizing the constitutional order.

In light of the lack of citizen engagement with the Constitution and the presidency as an office the prospects for change appear bleak. Although the sort of radical reframing of the constitutional order to provide legitimacy envisioned in Kalyvas work is necessary, substantial barriers still exist. Although there does not exist a single solution that in the near term can curtail the presidency, there does exist a necessary condition that must be established for any meaningful action to be taken. That condition is the reclamation of the language of sovereignty.

A Civic Constitution and Rhetorical Sovereignty

One of the problems facing the analysis by Kalyvas, and at the heart of Beaumont's reformulation of his line of argumentation, is the existence of a Constitution. Although Kalyvas' sensitivity toward the relationship between the constituency and the

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[283] Nelson, Dana. "The President and Presidentialism," *South Atlantic Quarterly* 105, no. 1, (2006): 12-13.
[284] Beaumont, Elizabeth. *The Civic Constitution: Civic Visions and Struggles in the Path toward Constitutional Democracy*. (Oxford: Oxford University Press, 2014), 2.

question of legitimacy undergirding democracy is well-placed, it has a theoretical hurdle: while it can explain why there was a public reaction to the terror war Presidents, it cannot explain what the constituents could do in practical terms to claim sovereignty against the executive branch.

This problem is implicitly addressed in Beaumont's conception of a "civic constitution." As Beaumont describes:

> This conception of a civic constitution does not suggest the existence of a form of pure and supreme "constituent power" emerging from a state of nature or a proletarian "multitude," as suggested by some constitutional theorists (Sieyes [1789] 1963; Negri 1999). Nor does it suggest the existence of a unified "voice of the people" or a homogenous general will suggested by others (Rousseau 1762). Rather, the civic constitution overlaps with the official legal Constitution, and it is pluralist and includes some areas of more commonly shared understandings of fundamental principles as well as many tensions and jarring disagreements (3).[285]

What is at play in Beaumont's conception is a means of articulating the public will to the text of the legal Constitution. In so doing, the problem of having to overthrow and entirely reconstitute the legal order is avoided through reformism. Yet this reformism is not, as some might argue, incapable of radical change. The examples Beaumont points to in her analysis, especially abolition and the women's rights movements, are genuinely revolutionary in that they reconfigured the Constitution to include bodies that were previously excluded. In both cases, the Constitution underwent revision, and the constituency embodied in that Constitution also changed. This is not to say that these processes were ideal, but that they were necessary is an original sin of the Constitution for which this country is still atoning. Moreover, they took far too long to happen and the

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[285] Beaumont, *The Civic Constitution: Civic Visions and Struggles in the Path toward Constitutional Democracy*, 3.

aspirations of the changes made to the Constitution remain, in important ways, unsatisfied. Nonetheless, they still demonstrate an approach that is worthy of consideration.

What Beaumont's analysis foregrounds is the role of civic groups or social movements in changing the Constitution. This civic constitutional approach provides at least a means to understand the historical precedents for changing the Constitution, but it is problematic when the specific conditions of conflict do not lend themselves to such an interaction. In the case of resisting the claims made by the executive branch on sovereignty stemming from a (contestable) interpretation of the Constitution, the notion of a resistance from civic groups or social movements is more fraught, because it is not rooted in claiming a place in the constituency. Instead, it is claiming a supremacy of the constituency over a branch of the government that is claiming to act on behalf of the constituency.

In his study of progressive politics and the development of war powers, Marshall provides a compelling example of the nature of the problem in noting that the progressive Presidents, in pursuing social reforms, also increased the power of the presidency (170-172).[286] This progressive investment in growing the power of the presidency came back as a tragedy in the George W. Bush administration as self-identified progressives saw the executive branch that their predecessors helped create now oppose them on the question of military intervention (167-169).[287] This reversal demonstrated the precariousness

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[286] Marshall, C. Kevin. "Progress, Return, and the Constitution" in *Constitutionalism, Executive Power, and the Spirit of Moderation: Murray P. Dry and the Nexus of Liberal Education and Politics*. Edited by Areshidze, G., Carrese, P.O., and Sherry, S. (Albany: SUNY Press, 2016), 170-172.
[287] Marshall, "Progress, Return, and the Constitution," 167-169.

posed by the executive branch as a decision-making body for any political position, but more importantly, it demonstrated the risk inherent in focusing civic constitutionalism around the reform of policies rather than the formation of the Constitution.

An example of this type of approach would be incorporating civic constitutionalism into the practice of voting by electing Presidents who publicly support a more limited view of the presidency. Unfortunately, as Nelson notes, the voting population has a poor track record in responding to the aggressive expansion of the presidency. In particular the development of the notion of a presidential mandate carried with it the notion that the presidency was being empowered to act as they saw fit, rather than deferring to the will of the people (93-96).[288] Put bluntly, the vote is seen as a sign of support for the leader, rather than a vote for the policy. Nelson goes on to argue that the emphasis on voting has created a tendency toward a shrinking (and ever less active) form of citizenship, as voting becomes a demonstration of faith in democracy rather than a genuine democratic practice of influencing government (100-102).[289] Voting, then, does not provide a response adequate to the charge of disempowering the presidency, because even if the vote is informed by sensitivity to constitutionalism, it does not account for the ability of Presidents to act on their own judgment. A clear example of this problem can be found in the election of Obama, who was publicly opposed to signing statements while he was campaigning, but continued to use them while in office.

This is not to say that the vote is meaningless. The outcome of an election can have significant influence on the future of a country. My concern is that changing

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[288] Nelson, Dana D. *Bad For Democracy*. (Minneapolis: University of Minnesota Press, 2010), 93-96.
[289] Nelson, Dana D. *Bad For Democracy*, 100-102.

leadership does not change the constitutional system within which Presidents exercise power. In order to provide a genuine response to presidential sovereignty there must be a more fundamental change in democratic practices that goes beyond voting. If a civic constitutionalism is to resist the presidency its efforts must be aimed at constraining the power of the presidency, rather than changing who occupies the office.

In light of this critique it is reasonable to ask if the civic constitution really is a helpful concept for describing how the presidency might be resisted. What is important for our analysis is that the civic constitution operates as a public understanding of the Constitution that is, at the same time, outside of it. To the extent that it has a source of legitimacy in constituent sovereignty, the civic constitution provides a theoretical and political access point for change to take place. If the abolition and women's rights movements are to be taken as blueprints, it is through the change in public understandings of the Constitution that legal change takes place in the form of constitutional amendments.

Yet the prospects for such a change to take place are not good. It would require garnering an immense amount of support not just from the public but from a host of political officials who have an investment in maintaining the current constitutional system. Nonetheless, it is possible, and perhaps more importantly, it can contribute to developing a new means of evaluating presidential action. If the measure of presidential action remains in the legal interpretation of the Constitution, then there is little hope for genuine public response because those interpretations already presume the legitimacy of presidential action, but by contrast, developing a civic constitution that circumscribes the

power of the presidency would serve two important functions. First, by creating the standards by which presidential action can be deemed unacceptable. In rare moments this effort might have some effect. The severe criticism of the Bush administration based on public dissatisfaction with the terror wars surely informed the Obama administration's view of the conflict, and did prompt attempts at policy change by Congress. Second, it can impact the deliberative processes of Presidents. It is telling that President George H.W. Bush in the wake of the first Persian Gulf War felt it necessary to declare the end of "Vietnam syndrome." If such a claim was necessary, it is because the public sense that the Vietnam War was so misguided that military intervention as a rule was to be avoided.

I do not suggest that these examples demonstrate the sufficiency of a civic constitution. The changes in policy during the terror wars mattered, but they were not a satisfactory resolution for the public. President George H. W. Bush declared the end of Vietnam syndrome after the conclusion of a war of choice. Yet to the extent that change is evident in these examples, it should be taken as a failure of degree rather than kind of response. It is for this reason that it is worthwhile to consider the possibility of a civic constitution that is defined by a resistance to the presidency.

In developing such a civic constitution it can be argued that there are a number of necessary, but independently insufficient, conditions which must be satisfied. The one that preoccupies the analysis presented here is the development of what I term "rhetorical sovereignty". This particular condition responds to the most significant element of the rhetorical presidency, that being the deployment of language to assert new forms of presidential sovereignty. To counter such a move, and lay claim to a source of

justification outside the Constitution, requires the development of rhetorical sovereignty by the peoples constituted within the Constitution.

The term "rhetorical sovereignty" is not entirely original, but I invoke it different than its existing academic uses. In existing literature the term, for example, it is used to refer to the efforts by indigenous persons to define themselves as a distinct population. Kemper uses the term to refer to the right of a people to create a preferred set of public understandings afforded to themselves (6).[290] Similarly, Lyon's argues that rhetorical sovereignty is defined by the right of a people to assert sovereignty against other peoples (450).[291] In both cases, the definition of rhetorical sovereignty centers on the ability of a smaller population within a polity to define itself as distinct and sovereign in relation to the polity. When considering the particular case of indigenous persons such a definition makes sense, given the tension created by the limited sovereignty afforded to indigenous persons by law as well as the historic and continued oppression of indigenous persons. In such circumstances, rhetorical sovereignty works as a means to assert a distinct history that requires a distinct set of actions to ameliorate injustice.

The problem posed by presidential sovereignty is that the constituent body already includes the groups at the margins, and cuts across the differentiation of peoples within the polity. Before the power of the presidency the distinction between indigenous persons and the larger population does not produce a distinction in the power relationship. Therefore, the notion of a sovereignty of a people against other peoples

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[290] Kemper, Kevin R. "Who Speaks for Indigenous Peoples? Tribal Journalists, Rhetorical Sovereignty, and Freedom of Expression," *Journalism and Communication Monographs* 12, no. 1, (2010): 6.
[291] Lyons, Scott R. "Rhetorical Sovereignty: What Do American Indians Want from Writing?" *College Composition and Communication*, 51, no. 3, (2000): 450.

within a constitutional order does not redress the relationship between the presidency and the constituency. As a result, a notion of rhetorical sovereignty that can be applied for the entire polity against the presidency rather than particular elements of the constituency is necessary.

There is an important delineation, however, between rhetorical sovereignty and presidential sovereignty that must be drawn. Where presidential sovereignty is exercised through the enactment of an exception through rhetoric, rhetorical sovereignty is performed through the self-constitution of a polity. In rhetorical sovereignty there is no ability to only declare an exception. Although there may be what Walter Benjamin describes as divine violence, or violence from outside an order, that is law destroying it also expiates the law (297).[292] Put differently, the function of divine violence is not merely to suspend an order, but to redress injustices that already exist within that order. Toward that end, rhetorical sovereignty by definition redresses the problem of presidential sovereignty by asserting the sovereignty of the people against the power of the presidency. In a form analogous to the use of illocutionary speech acts by Presidents to inaugurate a change in a state of affairs, rhetorical sovereignty is an assertion of the right of the people that in its successful performance redresses the power of the presidency.

The problem is that the felicity conditions for rhetorical sovereignty remain elusive. Although identifying all such conditions and needs is a greater effort than is possible here, outlining the characteristics of what a rhetoric aimed at rhetorical sovereignty entail is productive for understanding the problems inherent in that effort and

[292] Benjamin, *Reflections: Essays, Aphorisms, Autobiographical Writings*, 297.

providing a basis for understanding the concept of rhetorical sovereignty itself. This outline should not be taken as a precise dictate for what is to be done, but rather as a description of how a rhetoric could work through the civic constitution to assert the sovereignty of the public. In doing so, it describes the character of rhetorical sovereignty if not its exact content.

The first element required of a rhetorical sovereignty is a public that is constituted as sovereign. One of the inherent limitations in our current civic constitutional framework is that the body as constituted is already defined formally by citizenship. There exist myriad criticisms of how this definition exists noting the differential relationship of distinct populations to the Constitution, excluding immigrants, migrants, and in practice if not in law marginalized groups along the lines of race, class, sex, gender, sexual orientation, and so on and so forth. Yet these critiques should not be taken to limit the possibilities of what bodies can be involved in the process of asserting sovereignty. As Beaumont notes, if we think of the civic constitution as a process of "founding and refounding" the Constitution, the development of a civic constitution involves a practice of bodies laying claim to the Constitution from outside its traditionally recognized constituents (6-7).[293] Taken at face value, in practice it may well be that the rhetorical sovereignty is grounded in practices of citizenship, but the possibility that bodies selectively excluded from the order of the polity, what Agamben might refer to as "Homo Sacer," may well gain access to sovereignty as part of the development of rhetorical sovereignty.

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[293] Beaumont, *The Civic Constitution: Civic Visions and Struggles in the Path toward Constitutional Democracy*, 6-7.

To put it plainly, the notion of a civic constitution emphasizes openness to the possibility that those who can lay claim to changing the Constitution may exist outside the existing constitutional order. Toward that end, that the public that may lay claim to rhetorical sovereignty suggests the possibility of a broader polity than that which the executive branch can claim to act on the behalf of. Focusing on this broader constituency in thinking rhetorical sovereignty is an important development in that it responds directly to Agamben's concern that the sovereign could render decisions about inclusion/exclusion of the political order along the lines of human life. Yet by eliminating the categories of inside and outside from considerations of where sovereignty may arise from, the traditional power of the sovereign to make decisions at the level of life is undermined. The first element of a rhetorical sovereignty that resists presidential sovereignty, then, is openness to the inclusion of bodies that are currently excluded from the polity.

The second element that must be present in rhetorical sovereignty is the use of language that can initiate action. In the foregoing analysis, much of the emphasis has been on how Presidents are capable of creating and using institutional facts to initiate linguistic operations or speech acts that change the state of affairs. This insight from speech act theory demonstrates the need for a genre of public speech that can similarly create and use institutional facts to change the state of affairs. In the work of Beaumont this is done by making claims on the Constitution that can be adopted by the mainstream public and subsequently from political officials (8).[294] Zarefsky makes a similar

[294] Beaumont, *The Civic Constitution: Civic Visions and Struggles in the Path toward Constitutional Democracy*, 8.

argument, emphasizing that social movements (even those which are not explicitly minoritarian) must ultimately turn towards the state as a part of completing the reforms they desire. Moreover, many movements of rhetorical significance in Zarefsky's view are arbitrarily excluded from the understanding of social movements because they are sponsored or support by the government (370-371).[295] The difficulty preventing a movement, or perhaps more accurately a civic action, from engaging in such an activity is that the language necessary to appeal to the state in the sense described by Zarefsky does not have the form an illocutionary act. By contrast, Beaumont's notion of a civic constitution contains an element of such illocutionary action, but also an account of the illocutionary form of such civic constitutional interpretation is lacking.

This is the case because the sort of formalized genres and practices of speech acts which are available to the presidency are not available to the public. Whereas the presidency has a long established tradition of calling on the polity through use of what Maurice Charland has appropriately called a "constitutive rhetoric,"[296] there does not exist a clear public parallel in the context of a resistance to presidential sovereignty. This should be taken as an indication of where the work of developing rhetorical sovereignty ought to begin. The resistance to presidential sovereignty must seek to institutionalize the power of the people to use rhetorical action to discredit presidential action in a manner that is not only symbolic, but initiates genuine action.

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[295] Zarefsky, "President Johnson's War on Poverty: The Rhetoric of Three 'Establishment' Movements," *Communication Monographs* 44, no. 4, (1977): 370-371.

[296] Admittedly, Charland is speaking to a different context (and one that exists outside of the state). Nonetheless, the notion of a constituent rhetoric that calls an audience into being as a polity rather than speaks to an already existing polity seems to be a necessary component of founding a movement.

Before fleshing out what is meant by genuine action, an interrogation of Charland's notion of a constituent rhetoric provides both an important insight to this project and a cautionary tale. The significant insight in Charland's analysis stems from the movement for Quebec to establish independent sovereignty. As Charland argues, one of the challenges facing the movement was finding the proper rhetorical title for the public, as a failure to do so would create an a priori legal and constitutional question of whether such people could form a state (136-137).[297] What is of value here is that in order for the development of rhetorical sovereignty to take place, there must be an explicit operation whereby a public is able to create a system of identification that fits into the existing institutional facts such that an act of sovereignty can be created. Similar to Beaumont's appreciation for the fact that no Constitution is created without relation to historical precedents, rhetorical sovereignty must be founded in a public understanding that acknowledges the Constitution.

This brings us to another cautionary tale embedded in the history of the United States, namely that a rhetoric opposed to the sovereignty of the presidency (and more specifically, the government as an institution) already exists. It can be found in the white supremacist movement. As Goehring and Dionosopolous note, the Turner Diaries provide just such a constitutive rhetoric for the white supremacist movement in the United States that explicitly rejects the role of the United States government as a whole (374).[298] This points toward the theoretical dilemma in creating a constitutive rhetoric

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[297] Charland, Maurice. "Constitutive Rhetoric: The Case of The Peuple Quebecois," *Quarterly Journal of Speech* 83, no. 2, (1987): pp. 136-137.

[298] Goehring, Charles and Dionisopoulos, George N. "Identification by Antithesis: *The Turner Diaries* as Constitutive Rhetoric," *The Southern Communication Journal* 78, no. 5, (2013): 374.

that could support the notion of a civic constitution opposed to a presidency. Such a rhetoric must, if it is to serve the ends of eradicating the worst excesses borne out of an overly powerful presidency, have embedded within it not only the rejection of executive branch sovereignty, but a language that opposes the forms of American exceptionalism and white supremacy that have helped constitute the power of the executive branch. Put differently, the practice of rhetorical sovereignty functions as a genre of speech, and within that genre it is plausible that the rhetoric of white supremacists exist. Do note, however, that this is not the only possible rhetorical avenue, and indeed, there are other critiques and exercises of rhetorical sovereignty that exist. Yet the inclusion of white supremacy as a cautionary tale here is no accident. In developing rhetorical sovereignty there must be a positive political orientation rather than a purely negative rejection of presidential sovereignty. Failure to do so would likely tend to reinforce the most problematic elements of contemporary political discourse, particularly potent under the current presidency.

The final element of a rhetorical sovereignty is that it must be able to both constitute a genre and, by definition, must have a form. The strength exercised in presidential powers, as the foregoing chapters have argued, derives from the practices of iterability and citationality that develop speech acts that can be used to inaugurate power. Although it is difficult if not impossible within the existing constitutional order to conceive of a speech act that has the privileged relationship to power found in the speech acts that are presidential powers in the civic constitution, the development of genres

serves an important function. It gives the speech acts of the constituents an element of intelligibility by fitting into a set of expectations that can have force.

In more explicit terms, there needs to be the formalization of the act of rhetorical sovereignty that is structurally similar to a referendum. The similarity here stems from the importance of the act which inaugurates a new state of affairs. In the same way that the President issuing an executive order supersedes the existing political system by inaugurating a new policy, rhetorical sovereignty must find a mode of expression or genre of speech which is capable of at a minimum rejecting presidential action on behalf of the constituted population.

Yet the prospects for institutionalizing such a system are bleak. The current President, or any President, is unlikely to permit such a change through normal legislative action, and given there is no provision for such a referendum in the Constitution, an amendment would likely be necessary. The two means for achieving such a change, the constitutional convention and the legislative amendment are remarkably high, and arguably there is no amendment with as far reaching an effect as something along the lines of a referendum on presidential action. Certainly, to the extent that it is possible it will require the sort of extended effort over many years that other fundamental constitutional changes have required, and time is not necessarily on the side of the public.

Nonetheless, even if such formalization of rhetorical sovereignty is not conceivable in the near future, the concept of rhetorical sovereignty has value. In analyzing the presidency as an office that has a privileged relationship to speech acts, I have emphasized the legal nature of those acts because that is the way that the terror war

presidents have defined them. Yet the transformation of the rhetorical presidency traditionally understood by its reliance on public address points towards the possibility of a similar transformation in rhetorical sovereignty. The development of a rhetorical sovereignty, a shared public sense that presidency is not sovereign and is legitimate only to the extent that it serves the constituted population, provides a basis for public criticism of the presidency. This is not to say that such criticism will always be effective in changing policy, indeed the precedents set in the terror wars suggests that it will not. Yet providing a basis for such a criticism that does not rely on the legal Constitution allows for the development of a public critique of the presidency that is tied to the source of legitimacy for the Constitution found in the constituted population.

In this rough sketch there exist three characteristics that must be necessary in the development of rhetorical sovereignty and a civic constitution that can resist presidential sovereignty. First, there must be an openness to those excluded from the Constitution to undermine the ability of the presidency to make claims to sovereignty on behalf of the constituency. Second, there must be a commitment to creating modes of speech which constitute action that parallel the exercise of presidential powers. In pursuing this development, it will be important to retain political sensibilities that are resistant to the politics that have undergirded the exercise of presidential power, such as American exceptionalism. Third, the speech that gives rise to rhetorical sovereignty must be able to constitute a genre. The reality is that the formalization of public speech into something like a referendum is a project that will be years in the making, and indeed may prove to be impossible. Yet the development of a genre of speech defined by its opposition to

presidential sovereignty grounded in a sensitivity to constituent sovereignty can provide the public with the basis for a more potent critique of the presidency.

Realistically the future for such an approach is grim. It is hard to imagine a scenario where all of these elements coalesce together to successfully constrain the presidency. Nor does it come without risk. In rejecting the sovereignty of the presidency such a view is not only revolutionary in the sense that it changes the constitutional order, but it would raise the prospect of revolution in the more dramatic sense. It also risks empowering those groups which have already laid claim to sovereignty, including the white supremacist movement. Nonetheless, the failing of the contemporary constitutional system makes such a desperate endeavor necessary. Unless the power of the presidency to claim power outside the Constitution and to rule through decree is reduced then the legitimacy of the government will continue to remain suspect.

Conclusion

At the outset of this project I highlighted the presidential practices and beliefs expressed in the use of presidential powers following the September 11 attacks that permanently changed the nature of the government of the United States. First, both Presidents George W. Bush and Obama contributed to the creation and maintenance of sovereignty in the executive branch through a process of bureaucratization and constitutional interpretation performed through speech acts. Second, both Presidents took advantage of the generic elements of presidential powers to strategically expand the power of the office. Third, the policies pursued in the terror wars were rooted in the

personal power exercised by presidents that the public, Congress, and the courts were unable to effectively respond to.

In my analysis, I emphasized the similarity in forms and genres used by both these terror war Presidents while drawing out the differences in the policies expressed as well as potential differences in the ideological commitments of the presidents. These differences are important, as in a literal sense there are lives held in the balance of those differences. Yet the differences should not provide cover for the dangerous potential in the power exercised by both presidents. Although the Obama administration, as a rule, tended to adopt a more limited view of the presidency, it neither disavowed the power of the office established by the George W. Bush administration nor did it have the wherewithal many of the underlying ideological commitments that drove the George W. Bush administration.

At the core of this analysis is a return to the question that preoccupied much of the discussion in the introduction: has the presidency become post-rhetorical? As I argued in the preceding chapters, it is not the case that it has become post-rhetorical, but rather that the scholarship on the rhetorical presidency has in the era of the terror wars has unnecessarily limited its scope. The rhetoric found in the exercise of presidential powers fits within a broader performative framework of the presidency that could easily be defined as rhetorical. That presidents succeed and fail in their efforts through the effective use of language is as true in the use of presidential powers as it is in public address.

Presidential powers, because they are deployed through the use of speech acts give the rhetoric in those powers a privileged relationship to the exercise of power. This particular insight is important because it affords the presidency the ability to act in ways that are both unpredictable and difficult for the public, Congress, and the courts to redress. This difficulty arises from the simple fact that, in our contemporary moment, as always the power of the rhetorical presidency is derived as much from outside the Constitution as it is from it. The shift in the rhetorical presidency to incorporate presidential powers presents a new configuration that is uniquely difficult to challenge.

In responding to these insights garnered from the study of the conduct of terror war Presidents, I have attempted to provide a rough sketch of the character for a public response. Emphasizing the role of constituent sovereignty, I have argued that what is required is the development of rhetorical sovereignty, the ability for the public to define itself and develop its own civic constitution by which the actions of the Presidents may be judged. To do so requires a rhetoric that asserts a role for the constituency in calling into question the exercise of sovereign power by presidents that is: constitutive (rather than constituted), that is directed to the constitutional order (even if it comes from outside it), and can develop a distinct set of forms and become a genre seems to be the only solution that responds directly to the type of threat posed by presidential sovereignty. Yet this approach is not a panacea. Its success is not assured, and is perhaps unlikely. It is fraught with genuine risk that may provide a cure as bad as the disease. The problem is that in light of the failure of the contemporary approaches to the Constitution reflected in

the lives and liberties lost in the pursuit of the terror wars, the current situation is not sustainable.

The current situation is precarious. The power of the terror war Presidents has passed to new hands which seem if anything more committed to using and expanding them. In light of this change the conditions under which a response may be created could be seen as particularly poor. Certainly the current trajectory does not provide much in the way of hope. Even in this dark moment in the history of the relationship between the presidency and the public, there remains a dim hope in the power of the public to express discontent and to change the system. Such action is not without precedent, but the action needed in today's situation must go beyond the historical precedents to radically change the constitutional framework of the United States.

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